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90-621

Supreme Court, U.S.
FILED
OCT 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1990

RONALD D. CASTILLE, District Attorney
of Philadelphia County;
JOSEPH M. RYAN, Superintendent,
State Correctional Institute at Dallas;
and ERNEST D. PREATE, Jr.,
Attorney General of Pennsylvania,
Petitioners

V.

WILLIAM HOWARD HARRISON,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

GAELE McLAUGHLIN BARTHOLD
Deputy District Attorney
(Counsel of Record)
ELIZABETH J. CHAMBERS
Chief, Federal Litigation
KATHY L. ECHTERNACH
Assistant District Attorney
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QUESTION PRESENTED

Where credited, uncontradicted, circumstantial evidence supports a habeas court's factual finding that racial bias was not the motive for a prosecutor's use of a peremptory challenge in a case tried years before Batson v. Kentucky was decided, does Batson nonetheless require relief solely because the passage of time has made the prosecutor unable to recall his precise race-neutral reason for the strike?

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V.

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Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioners, Ronald D. Castille, District Attorney of Philadelphia County, Joseph M. Ryan, Superintendent, State Correctional Institute at Dallas, and Ernest D. Preate, Jr., Attorney General of the Commonwealth of Pennsylvania, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for

the Third Circuit, entered in this proceeding on July 25, 1990.

OPINIONS BELOW

The published panel opinion of the United States Court of Appeals for the Third Circuit, affirming the District Court order granting the petition for habeas corpus, is reprinted in Appendix A at A-1 - A-18. The memorandum order of the United States District Court for the Eastern District of Pennsylvania is reprinted in Appendix B at B-1 - B-5. The report and recommendation of the Chief United States Magistrate for the Eastern District of Pennsylvania, which was adopted by the District Court, is reprinted in Appendix C at C-1 - C-69.

STATEMENT OF JURISDICTION

Respondent William Howard Harrison brought this habeas corpus action pursuant to 28 U.S.C. Section 2254. The judgment of the United States Court of

Appeals for the Third Circuit, affirming the District Court's grant of habeas corpus relief, was entered on July 25, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Section 1:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In September of 1982, more than three years before this Court decided Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986), respondent, who is black, was convicted by a jury of robbery and conspiracy. Respondent's trial for the gunpoint robbery of a Philadelphia bank did not involve any racially sensitive issues. Nevertheless, during voir dire,

defense counsel objected to the prosecutor's use of peremptory strikes to remove black venirepersons. The trial court overruled counsel's objection because the law, as it then existed under Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824 (1965), did not require the prosecutor to explain his strikes. Respondent's petit jury ultimately consisted of eleven white jurors and one dark-skinned person from India; the prosecutor used six of his eight peremptory challenges to remove black venirepersons.

The Pennsylvania Superior Court affirmed the conviction on May 16, 1986, just two weeks after Batson was decided, holding that respondent had failed to make a prima facie showing of intentional racial discrimination under Batson. Respondent's petition for allowance of appeal to the Pennsylvania Supreme Court,

which reiterated his Batson claim, was denied on December 29, 1986.

Respondent filed the instant habeas corpus action in November of 1987. Subsequently, the District Court for the Eastern District of Pennsylvania ordered an evidentiary hearing on the claim that the prosecutor had improperly exercised his peremptory strikes more than three years before Batson was decided.[1]

At the District Court hearing, held six years after trial, the Commonwealth called the prosecutor. He testified as to his general jury selection strategy while employed in the Philadelphia District Attorney's Office and explained his peremptory challenges in

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[1]Since respondent's case was still pending on direct appeal when Batson was decided, his claim was cognizable. Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708 (1987).

respondent's case. Additionally, the Commonwealth introduced the prosecutor's hand-written notes, made at the time of voir dire; these notes evidenced his deliberative process during jury selection in respondent's trial six years earlier.

The prosecutor, who was in private practice at the time of the Batson hearing, had no independent recollection of the race, physical appearance, demeanor or responses of the venirepersons questioned on voir dire in respondent's trial. Nevertheless, he was able to testify as to the jury selection process based upon his contemporaneous hand-written notes, the voir dire notes of testimony and his general strategy while a prosecutor.

The prosecutor explicitly testified that race was not a factor that he considered in exercising his strikes. Indeed, he did not even record in his notes, made at the time of voir dire, the

race of any of the venirepersons questioned. Rather, those notes -- which were made before Batson, when the prosecutor had no reason to think that they would ever be viewed by anyone other than himself -- reflect a deliberative process that took into account only the individual characteristics of the potential jurors.

With respect to his general jury selection strategy, the prosecutor testified that he usually favored venirepersons who appeared capable of cooperating with others and who responded well to him, as opposed to defense counsel, during voir dire. He favored venirepersons with a good employment history. He also considered a potential juror's educational background and, to the extent that it was disclosed during voir dire, the occupations and background of the venireperson's family and friends.

With respect to the particular black venirepersons that he struck in respondent's case, the prosecutor articulated specific non-racial reasons, credited by the magistrate, for five of his six peremptory challenges.[2] The

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[2]The prosecutor testified that although he was initially inclined to accept Richard Edwards, he immediately changed his mind and decided to strike him when Edwards revealed during voir dire that his son had been convicted for carrying a .357 Magnum into a bank. The prosecutor struck Sammy Toney because he was sitting next to Edwards, had a background remarkably similar to Edwards, and might have been friendly with him. The prosecutor noted that Toney and Edwards were each 56 years old and originally from South Carolina; neither had completed high school; and each was unemployed from a blue collar position at the time of voir dire.

Stanley Logue was struck because he described his educational background as "liberal arts." The prosecutor viewed liberal arts majors as inquisitive, inclined to look for doubt, and likely to raise issues not addressed by the attorneys at trial.

(Footnote Continued)

prosecutor, however, was not able to recall his precise non-racial reason for striking the sixth venireperson, Alice Wright. Nevertheless, the magistrate found that the prosecutor's hand-written notes affirmatively eliminated racial bias as a motivation for that peremptory challenge.

This factual finding was exceedingly well-supported. In his hand-written notes made at the time of voir dire -- more than three years before Batson was even decided -- the prosecutor initially wrote "OK" next to Wright's name. He

---

(Footnote Continued)

The prosecutor struck Rudolph Gray because he had been arrested for interfering with a police officer, and, therefore, was likely to be critical of the prosecution. Finally, the prosecutor removed Alma Nottingham because, as even defense counsel noted during voir dire, she was tentative when questioned about whether she could be fair to both the prosecution and the defense at trial.

testified that that notation meant that when he first saw Wright -- and her race was plainly evident -- he was inclined to accept her as a juror. After listening to Wright's answers and observing her demeanor during voir dire, however, he changed his mind and decided to strike her.[3] Although the prosecutor was not able to recall specifically why he had changed his mind six years earlier, the magistrate found that his initial inclination to accept venireperson Wright, when virtually all he knew about her was her physical appearance, including her race, eliminated any inference of discriminatory intent.

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[3]The prosecutor testified that Wright's age of seventy may have been a factor in his decision to strike her. Moreover, like venirepersons Edwards and Toney, whom the prosecutor also struck, Wright fit a profile of being from the South, not having completed her high school education, and being unemployed at the time of trial. See note 2, supra.

Appendix C, C-44 ("the initials 'O.K.' written in the prosecutor's notes dissipates the inference that the prosecutor struck this juror solely because of race.").[4]

In expressly crediting the prosecutor's testimony and finding as a fact that his peremptory strike of venireperson Wright was not motivated by racial bias and that he did not discriminate in jury selection, the magistrate stated: "We also have no reason to conclude that [the prosecutor] exercised

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[4]The prosecutor also wrote "OK" next to Edwards' name, indicating that he was inclined to accept Edwards as a juror before he revealed his son's conviction for a weapons offense. See note 2, supra. As with venireperson Wright, the magistrate found that the prosecutor's initial inclination to accept Edwards refuted any inference of racial motivation. Appendix C, C-41 - C-42. With Edwards, however, the prosecutor was also able to affirmatively reconstruct the race-neutral reason for his strike.

purposeful discrimination or that his motives and creditability [sic] are suspect." Appendix C, C-40. The magistrate, however, thereafter erroneously concluded as a matter of law that Batson required relief, despite the elimination of racially discriminatory intent. He did so because the prosecutor was unable to recall his precise non-racial reason for striking Wright six years earlier. Id. at C-67 ("I do not believe that [the prosecutor] utilized his peremptory challenges in a discriminatory manner, but only that he failed to satisfy the Batson test.").

The District Court approved and adopted the magistrate's report and recommendation, and granted respondent's petition for a writ of habeas corpus. Specifically, the District Court adopted both the magistrate's finding that racial bias was not a reason for the prosecutor's strike of venireperson Wright, as well as

the conclusion that Batson nonetheless compelled relief because the prosecutor "failed to articulate a neutral reason for challenging one of the six jurors." Appendix B, B-3.

The Third Circuit affirmed the District Court's grant of respondent's habeas corpus petition.[5] The Appeals Court acknowledged that, given the passage of six years between respondent's trial and the Batson hearing, it was not surprising that the prosecutor could not

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[5]On appeal, respondent conceded the validity of the prosecutor's explanation for three of his peremptory strikes (Edwards, Gray and Nottingham), but continued to challenge the basis for two of the strikes (Toney and Logue), in addition to venireperson Wright. The Third Circuit, however, rejected respondent's challenge to the prosecutor's explanation for those two strikes because respondent failed to show that the District Court's decision to credit them was clearly erroneous. Appendix A, A-4, n.1.

remember the non-racial reason for one of his strikes (Appendix A, A-13), and quoted the prosecutor's testimony that he was initially inclined to accept juror Wright (Id. at A-11). Nevertheless, the Appeals Court completely disregarded the District Court's factual finding that the prosecutor's initial inclination to accept Wright, when he obviously knew her race, eliminated any inference of racially discriminatory intent.

Like the District Court, the Appeals Court held that Batson required the grant of relief, regardless of the uncontradicted, objective evidence excluding racial bias as a motivation for the peremptory challenge. It so held solely because the prosecutor could not articulate the precise non-racial reason that motivated his strike of venireperson Wright six years earlier. Review of that decision is imperative.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT REVIEW TO RESOLVE A DECISIONAL CONFLICT AMONG THE CIRCUITS AND MAKE CLEAR THAT BATSON v. KENTUCKY DOES NOT REQUIRE RELIEF IN A CASE TRIED YEARS BEFORE BATSON WAS DECIDED WHERE CREDITED, UNCONTRADICTED, CIRCUMSTANTIAL EVIDENCE SUPPORTS A HABEAS COURT'S FACTUAL FINDING THAT RACIAL BIAS WAS NOT THE MOTIVE FOR A PROSECUTOR'S USE OF A PEREMPTORY CHALLENGE AND THE PROSECUTOR IS UNABLE TO RECALL THE PRECISE RACE-NEUTRAL REASON FOR THE STRIKE SOLELY BECAUSE OF THE PASSAGE OF TIME.

Taking Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986), to an absurd and illogical extreme that was never intended by this Court, the Third Circuit granted respondent relief in the face of evidence, credited by the District Court, which clearly eliminated racial bias as a motive for the prosecutor's peremptory challenge. Review by this Court is, therefore, essential.

Batson's general presumption of racial bias, which arises upon a prosecutor's inability to articulate a precise

racially neutral reason for a peremptory strike, does not logically follow in a pre-Batson case such as this, where the failure to articulate such a reason six years after trial is due only to the prosecutor's admittedly genuine inability to remember, and where, as here, the objective, uncontradicted evidence, credited by the District Court, eliminates racial discrimination as the motive for the peremptory challenge.[6] Indeed, granting relief in a case such as this

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[6]Because Batson applies to all cases that were not yet final when Batson was decided and because pre-Batson prosecutors had no reason to record the reasons for their exercise of strikes, the situation here presented already occurs with some frequency (see pages 23-27, infra). Should Congress, which has recently considered legislation to make Batson fully retroactive (see, e.g., the failed Berman amendment to H.R. 5269), ultimately be successful in that endeavor, similar cases would arise in far greater numbers, thereby jeopardizing many additional valid and properly obtained convictions.

contravenes this Court's clear policy -- expressed in Allen v. Hardy, 478 U.S. 255, 106 S.Ct. 2878 (1986) -- against interpreting and applying Batson to grant convicts windfall relief in pre-Batson cases where dimming memories preclude the prosecution from marshalling its proof. Relief in such cases is even more inappropriate where, as here, evidence other than the prosecutor's articulation of his reason was available and relied upon by the factfinder to exclude race as the motivation for the exercise of a peremptory challenge.

Petitioners do not contend, and never have contended, that a prosecutor generally can meet his burden under Batson by claiming not to remember the reason for a strike. As this Court recognized in Batson, where the prosecutor, at the time of trial, is unable to articulate a race-neutral reason for his peremptory

challenge, an inference of racial discrimination logically follows. Here, however, where the prosecutor was not called upon to explain his strikes until six years after trial, the prosecutor's inability to articulate a race-neutral reason supports only the inference that he cannot recall the reason for his strike, not the inference relevant for Batson purposes that the strike was racially motivated.[7]

Notwithstanding the prosecutor's inability in this pre-Batson case to recall the reason for his strike of one potential juror, the District Court had before it other evidence from which it

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[7]Indeed, the District Court expressly credited the prosecutor's testimony that he could not remember the precise race-neutral reason for his strike of venireperson Wright, and the Third Circuit noted that the prosecutor's inability to recall was not surprising given the six years between trial and the hearing.

could, and did, find that that peremptory strike was not motivated by racial bias.[8] That affirmative finding of non-discrimination was based upon the prosecutor's contemporaneous hand-written notes, which reflected a deliberative process that did not even consider the race of the venirepersons and which affirmatively showed that the prosecutor initially intended to accept Wright, when he obviously knew her race, thereby eliminating racial bias as the motivation for the

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[8]The District Court's finding of non-discrimination is a factual finding, which is entitled to great deference. Batson, supra, 106 S.Ct. at 1724, n. 21. Nevertheless, in granting relief, the Third Circuit expressed its view that, despite being acceptable under Batson, some of the prosecutor's race-neutral reasons for striking venirepersons other than Wright were "not strong." Appendix A, A-6, n.2, A-13. That comment is nothing more than a thinly veiled reassessment of the prosecutor's credibility, a matter clearly beyond the Court of Appeals' proper scope of review.

prosecutor's subsequent decision to strike her.

Nevertheless, the Third Circuit granted relief, in the absence of racial discrimination, solely because the prosecutor could not remember, six years after trial, the precise race-neutral reason for one of his peremptory strikes. That ruling, in the face of an affirmative factual finding of non-discrimination, not only misapplied this Court's decision in Batson and ignored the mandate of Allen v. Hardy, supra, but it also conflicts with the rulings of the United States Courts of Appeals for the Eighth and the Fourth Circuits.[9]

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[9]The Third Circuit crafted its opinion in a way that unsuccessfully attempts to disguise the import of its decision and the conflict among the Circuits. Thus, although the Appeals Court quoted in its opinion the

(Footnote Continued)

Batson prohibits only intentional racial discrimination and permits the prosecutor to freely strike venirepersons of any racial minority so long as he does not do so because of their race. Thus, the whole purpose behind Batson's evidentiary procedures is to provide the factfinder with the ability to make an informed decision as to the prosecutor's motivation in exercising his peremptory challenges. Where the

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(Footnote Continued)
prosecutor's testimony that he was initially inclined to accept venireperson Wright (Appendix A, A-11), the Third Circuit ignored the District Court's factual finding that that evidence eliminated any inference of discrimination (Appendix C, C-44, C-67). Indeed, the Third Circuit purported to base its decision upon the principle -- which the Commonwealth has never disputed -- that Batson requires relief even where only one venireperson is excluded for racial reasons. Appendix A, A-14 - A-17. The record, however, affirmatively shows, and the District Court found as a fact, that no venirepersons were excluded on the basis of race.

overwhelming, uncontradicted evidence eliminates any inference of discrimination, Batson does not require relief. Indeed, to grant relief in a case such as this contravenes Batson's express purpose of prohibiting only purposeful discrimination, while preserving the peremptory challenge.

Here, the prosecutor fully met his burden to explain his peremptory challenges by offering racially neutral reasons for five of his strikes and by showing through evidence, other than general assertions of non-discrimination, that his remaining strike was not the result of racial bias. It is ludicrous to hold that a prisoner is automatically entitled to relief in a pre-Batson case, merely because the prosecutor cannot remember the precise non-racial reason for a single strike six years earlier, where, as here, the prosecutor successfully

excludes race as a motive for his peremptory challenge. To suggest, as the Third Circuit does, that the interests of justice are served by expending public funds and judicial and prosecutorial resources for a new trial in the face of an affirmative, well-supported factual finding of non-discrimination surely turns justice on its head.

Such considerations have led other Circuits to accommodate the evidentiary rule of Batson to the unique difficulties attending pre-Batson cases. Unlike the Third Circuit, the Fourth and the Eighth Circuits have expressly recognized that in a pre-Batson case such as this, the prosecutor's inability to remember his precise non-racial reason for striking each potential juror does not logically give rise to an inference of racial discrimination and is not fatal to his ability to satisfy the prosecution's

burden under Batson.[10] Thus, in United States v. Wilson, 867 F.2d 486 (8th Cir.), cert. denied, 110 S.Ct. 92 (1989), the Eighth Circuit rejected the defendant's Batson claim even though the prosecutor could not remember the reason for two out of three of his peremptory strikes of black venirepersons. The prosecutor could not recall why he struck two black women from the venire, but testified that generally in a case involving "street" crime, he tried to maximize the number of men on the jury. In view of the two and one-half years between the defendant's trial and the Batson hearing, the Eighth

---

[10] In briefing and argument before the Third Circuit, petitioners cited and expressly relied upon the Fourth and Eighth Circuit cases cited above. Nevertheless, in its opinion the Third Circuit failed to even address, much less distinguish, the reasoning applied by those Courts of Appeals in interpreting Batson.

burden under Batson.[10] Thus, in United States v. Wilson, 467 F.2d 455 (6th Cir.), cert. denied, 410 U.S. cc. 72 (1969), the Eighth Circuit rejected the defendant's Batson claim even though the prosecutor could not remember the reason for two out of three of his peremptory strikes of black veniremembers. The prosecutor could not recall why he struck two black women from the venire, but testified that generally in a case involving "street" crime, he tried to maximize the number of men on the jury. In view of the two and one-half years between the defendant's trial and the Batson hearing, the Eighth

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[10] In briefing and argument before the Third Circuit, petitioners cited and expressly relied on the Fourth and Eighth Circuit cases cited above. Nevertheless, in its opinion the Third Circuit failed to even address, much less distinguish, the reasoning applied by those Courts of Appeals in interpreting Batson.

Circuit found the prosecutor's explanation acceptable under Batson.

In United States v. Nicholson, 885 F.2d 481 (8th Cir. 1989), the Eighth Circuit also rejected the defendant's Batson claim where the prosecutor was unable to remember his reasons for striking three black venirepersons. Instead, taking into account the two years between trial and the Batson hearing, the court credited and relied upon the prosecutor's testimony as to the general guidelines that he normally followed in exercising peremptory challenges. See also United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986) (failure to explain every peremptory strike is not necessarily fatal to prosecutor's ability to meet burden under Batson); United States v. Forbes, 816 F.2d 1006, 1011, n. 7 (5th Cir. 1987) (same).

The Fourth Circuit, too, has rejected the Third Circuit's illogical extension of Batson. In United States v. Harrell, a/k/a Allen, 847 F.2d 138 (4th Cir.), cert. denied, 488 U.S. 944, 109 S.Ct. 371 (1988), the Fourth Circuit adopted the opinion of the District Court in United States v. Allen, a/k/a Harrell, 666 F. Supp. 847 (E.D. Va. 1987), holding that the government had successfully met its burden under Batson. There, the prosecutor testified with respect to one venireperson that he had written "no" next to her name, indicating that he struck her based upon her demeanor, although he could not recall specifically what he had observed about her at the time of trial that he found unacceptable. In rejecting the defendant's claim, the court noted that two years had passed since trial and, therefore, found credible and acceptable the prosecutor's explanation, to the best

of his recollection, for striking the venireperson based upon his perception of her demeanor.

Unlike the Eighth and the Fourth Circuits, the Third Circuit's analysis virtually guarantees windfall relief to any defendant convicted before Batson who makes a prima facie showing of discrimination. As this Court recognized in Allen v. Hardy, supra, 106 S.Ct. at 288:

> [It] would be impossible in virtually every [such] case [for the prosecutor to explain his reasons for the challenges] since the prosecutor, relying on Swain, would have had no reason to think such an explanation would someday be necessary. Many final convictions therefore would be vacated, with trial "hampered by problems of lost evidence, faulty memory, and missing witnesses."

(citations omitted).

As the foregoing cases show, the issue presented by this case is recurring with frequency if for no other reason than the fact that Batson applies to all cases that were pending on direct review at the

time it was decided. Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708 (1987). See also n.6, supra. It is essential that Batson's mandate be clarified so that henceforth relief is granted under Batson only in cases of purposeful racial discrimination. For that reason, and to resolve the decisional conflict among the Circuits, this Court should grant review.

CONCLUSION

For all the foregoing reasons, the Commonwealth of Pennsylvania, through the named petitioners, respectfully requests that a Writ of Certiorari issue to review the decision below.

Respectfully submitted,

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APPENDIX "A"

FILED: JULY 25, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-1175 and 90-1220

HARRISON, WILLIAM HOWARD

vs.

RYAN, JOSEPH M., SUPT., S.C.I.
DALLAS, PA. AND
THE ATTORNEY GENERAL OF THE STATE
OF PENNSYLVANIA

Joseph M. Ryan, The Attorney General
of the State of Pennsylvania and
Ronald D. Castille,

Appellants in No. 90-1175

HARRISON, WILLIAM HOWARD

Appellant in No. 90-1220

vs.

RYAN, JOSEPH M., SUPT., S.C.I.
DALLAS, PA. AND
THE ATTORNEY GENERAL OF THE STATE
OF PENNSYLVANIA

Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Civil No. 87-07439)
Argued
June 27, 1990

Before: SLOVITER and
MANSMANN, Circuit Judges,
and THOMPSON, District Judge.*

(Filed July 25, 1990)

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---

* Honorable Anne E. Thompson of the United States District Court for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

MANSMANN, Circuit Judge.

In this appeal from the grant of a writ of habeas corpus, the Commonwealth of Pennsylvania contends that the petitioner, William Howard Harrison, is not entitled to habeas relief under Batson v. Kentucky, 476 U.S. 79 (1986), which prohibits the prosecution's use of peremptory challenges to exclude individuals from serving as jurors on the basis of race. Because Harrison's appeal from the judgment of sentence was on direct review in the state court system at the time of the Batson decision, and because the prosecution was unable to articulate a racially neutral reason for its peremptory challenge of a black jury venireperson, we will affirm the decision of the district court. Harrison's cross-appeal is mooted

by our decision in his favor in the government's appeal.[1]

I.

In September, 1982, the petitioner, William Howard Harrison, was tried and convicted of robbery and conspiracy. During the jury selection process, the prosecutor used six of his eight peremptory challenges to dismiss jury venirepersons from the jury panel. All six were black; Harrison is black. Harrison's trial counsel timely objected

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[1]Harrison alleged in his cross-appeal that the magistrate's determination that the prosecutor had not discriminated by using his peremptory challenges against two other veniremen was clearly erroneous. In light of our holding which mandates a new trial, we need not address this contention. We note, however, that the determination of whether the prosecutor's reason was racially neutral is a factual determination and therefore entitled to great deference. Batson, 476 U.S. at 98, n.21. Harrison did not offer evidence to show that the determination as to the two veniremen was clearly erroneous.

to the prosecutor's use of peremptory challenges to exclude all black venirepersons.

In April, 1986, the Supreme Court decided Batson v. Kentucky, 476 U.S. 79 (1986), and held that the equal protection clause is violated when venirepersons are excluded from the jury on the basis of race. At that time, Harrison's direct appeal from his conviction was pending before the Pennsylvania Superior Court, which affirmed his conviction in May of 1986. The Pennsylvania Supreme Court denied allocatur in December, 1986.

On November 19, 1987, Harrison filed a petition for writ of habeas corpus, challenging his conviction and incarceration. He alleged that the prosecutor had impermissibly used race as a factor, when using his peremptory challenges, in order to exclude Blacks from the jury. The United States Magistrate

held a hearing in October of 1988, to determine whether the prosecutor could provide clear, specific and racially neutral explanations for his peremptory challenges. The magistrate issued a Report and Recommendation concluding that the prosecutor was able to articulate racially neutral explanations for the dismissal of five of the six venirepersons, but was unable to explain the dismissal of the sixth.[2] Consequently, the magistrate recommended that the certificate of probable cause be issued and the writ granted.

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[2]The magistrate did recognize that the race-neutral reasons articulated by the prosecutor with respect to several black jurors were not strong: (1) Juror Logue had a "liberal arts" education; (2) Juror Nottingham was tentative in her responses; and (3) Juror Toney sat next to and was talking to Juror Edwards who had previously been struck.

The district court adopted the Report and Recommendation of the magistrate and granted the writ. The district court then ordered that the Commonwealth either retry the petitioner within 90 days or release him. The Commonwealth appealed from the grant of the writ.

Because Harrison's appeal from his conviction was on direct review in the Pennsylvania state court system at the time of the Supreme Court's decision in Batson, we must apply the new rule. Griffith v. Kentucky, 479 U.S. 315 (1987) (new rule for the conduct of criminal prosecutions is to be applied to all cases, state or federal, pending on direct review or not yet final). The district court's factual determinations, including issues of credibility, are entitled to great deference and are not to be overturned unless clearly erroneous. Batson v. Kentucky, 476 U.S. 79 (1986). As to

matters concerning questions of law, however, we have plenary review.

II.

In Batson v. Kentucky, 476 U.S. 79 (1986), the Supreme Court reaffirmed a principle decided over one hundred years earlier that "the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded." 476 U.S. at 85, citing Strauder v. West Virginia, 100 U.S. 303 (1880). Moreover, the Court noted, racial discrimination in the selection of jurors not only harms the defendant but also harms the excluded juror and brings into question the fairness of the judicial system. Id. at 87.

To avoid the crippling burden of proof which has been placed on the defendant by some courts to establish the existence of a violation of the equal

protection clause, the Court discerned the elements of a prima facie case from the many cases applying Strauder. 476 U.S. at 92-94. Thus, to establish a case of purposeful discrimination, the defendant must show that

> he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate'. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the inference of purposeful discrimination.

Batson, 476 U.S. at 96. Once the defendant establishes the prima facie showing, the State has the burden of articulating a racially neutral reason for challenging

the black venirepersons. While the prosecutor's explanation need not rise to the level necessary to justify a challenge for cause, a mere affirmation of good faith is insufficient. Id. at 97.

In the case before us, Harrison established that he was a member of a cognizable race, i.e., he is black, and that the prosecutor used six of his eight peremptory challenges to eliminate six black venirepersons from the jury. In order to determine if other factors or circumstances could have resulted in the dismissal of the black venirepersons, an evidentiary hearing was necessary.

The magistrate thus conducted a hearing at which the prosecutor reconstructed the jury selection through the use of his notes. Based upon the examination of the prosecutor and the transcript of the jury voir dire, the magistrate concluded that of the six black jurors

excluded by peremptory challenge, only one challenge was unexplained. The prosecutor believed it may have been due to her age (70 at the time) but was not certain. The transcript of the evidentiary hearing reveals the following colloquy:

> Q. Now, the notation O.K. would mean what to you at this time?
>
> A. That means she was okay. I was going to take her as a juror, that I was going to accept her.
>
> Q. But you did not, obviously.
>
> A. Correct.
>
> Q. And what if you can, tell us what would be the reason that you would strike her?
>
> A. I don't know.
>
> Q. You don't have a present recollection, is that correct?
>
> A. That's right.
>
> * * *
>
> A. Just looking at these notes, I don't know. I don't have her age down here. The fact that her son is a retired police officer, I assume she is an older woman. That could have been a factor; I don't know.

Appendix at 198. Due to this lack of certainty, the magistrate found that the Commonwealth failed to rebut Harrison's prima facie showing of racial discrimination as to the one juror. Indeed, the magistrate stated:

> The reason why I must reject this explanation is not because of age but because the prosecutor could not recall his reason. The testimony which I credit is summarized by his repeated statement "I don't know." Since this is not a satisfactory explanation under Batson, I conclude the evidence is not acceptable and the Commonwealth has failed to meet the standard.

Appendix at 263. We agree with the magistrate, and with the district court which approved the magistrate's Report and Recommendation, that the prosecutor's failure to recall his reason for using a peremptory challenge to strike the juror was insufficient to satisfy the Batson requirement that the "prosecutor ... must articulate a neutral explanation related to the particular case to be tried." 476

U.S. at 98. It is certainly not suprising that the prosecutor could not recall his reason given the length of time which passed between jury selection and the Batson hearing. Indeed, the difficulty of the prosecution to recall reasons for peremptory challenges was the reason the Supreme Court decided not to apply Batson to cases on collateral review. See Allen v. Hardy, 478 U.S. 255 (1986). Certain other factors, however, most notably the interests of justice, require retroactive application of Batson for cases on direct review even where a long period of time occurs in the state court appellate process. This is especially true here where defense counsel timely objected to the use of peremptory challenges, the number of peremptory challenges exercised against Blacks was so great, the race neutral reasons given for striking other black jury venirepersons were so weak, and

the prosecutor was unable to articulate a race neutral reason for striking one of the black venirepersons.

Having determined that the Commonwealth has failed to meet its burden, i.e., that the "prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges," Batson, 476 U.S. at 98, n.20, (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)), we are now faced with the question of whether the exclusion of one black juror from the jury on the basis of race is sufficient to require a new trial pursuant to Batson. We hold that it is.

The Court in Batson was necessarily concerned about the effect of racial discrimination within the judicial system where it "is most pernicious because it is a 'stimulant to that race

prejudice which is an impediment to securing to black citizens that equal justice which the law aims to secure to all others.'" 476 U.S. at 88, citing Strauder v. West Virginia, 100 U.S. at 308. Moreover, the Court noted that

> [j]ust as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as ... jurors, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race.

Batson, 476 U.S. at 97-98. While the Court recognized the administrative burdens the prosecution and trial courts would face in following the Batson mandate, the Court also recognized that "[b]y requiring trial courts to be sensitive to the racially discriminatory use of

peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice." Id. at 99. This holds true when even one black person is excluded for racially-motivated reasons.

Our holding is supported by decisions of two of our sister courts of appeals. In United States v. David, 803 F.2d 1567 (11th Cir. 1986), the Court of Appeals for the Eleventh Circuit stated: "the striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for the striking of some black jurors are shown." 803 F.2d at 1571. The court reasoned that the rationale of Batson was premised on the notion that black venirepersons are entitled not to be struck for racially motivated reasons and black defendants have the right to be

tried in a judicial system which does not exclude on the basis of race. Id. The Court of Appeals for the Eighth Circuit held similarly in United States v. Battle, 836 F.2d 1084 (8th Cir. 1987).

III.

Since we believe that the Batson Court placed the requirements of justice and equal protection above the burden placed on the Commonwealth to retry the defendant before a jury from which no one has been excluded for a racially motivated reason, we conclude that the prosecution's failure to rebut Harrison's prima facie showing of racial discrimination as to one juror dictates the grant of a new trial. We recognize the burden placed on the Commonwealth to retry Harrison after almost nine years have passed. Nevertheless, the intent of the Supreme Court in deciding Batson was to guarantee, both to the defendant desiring a jury trial and to

the jury venirepersons, that the jury will be selected on a racially non-discriminatory basis. Consequently, we will affirm the order of the district court granting the petitioner's writ of habeas corpus and requiring the Commonwealth to either retry the petitioner within 90 days or release him.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM HOWARD HARRISON, Petitioner	:	CIVIL ACTION
v.	:	
JOSEPH M. RYAN, SUPT., S.C.I. DALLAS, PA, Respondent	:	NO. 87-7439
and	:	
THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Additional Respondent	:	

MEMORANDUM ORDER

AND NOW, TO WIT, this 26th day of January, 1990, in consideration of the pleadings and record herein, and after review of the Report and Recommendation of Tullio Gene Leomporra, Chief United States Magistrate, and the objections filed thereto, it is hereby ORDERED that:

1. The Report and Recommendation is approved and adopted.

2. The petitioner's Petition for Habeas Corpus is granted.

3. The petitioner shall be retried within ninety (90) days from the date of this Order.

4. If the Commonwealth fails to retry petitioner as ordered, petitioner shall be released.

Having reviewed the record before it, the court adopts the findings of fact as stated in the Report and Recommendation. As explained in the Report and Recommendation, in order for a petitioner to successfully contest a prosecutor's use of peremptory challenges as violating the Equal Protection Clause of the Constitution, the petitioner must establish a prima face case of purposeful discrimination as required by the United States Supreme Court in Batson v. Kentucky, 106 S.Ct. 1712, 1723 (1986). Based on the evidence provided in the record, the court is satisfied that petitioner has met this burden. Specifically, the

petitioner made a showing that he is black and that all six of the venirepersons the prosecutor peremptorily challenged were black. The record also indicates that the jury consisted of eleven white persons and one dark-skinned Indian. Having made that showing, the burden then shifted to the Commonwealth to come forward with a neutral explanation for challenging black jurors. Batson, 106 S.Ct. at 1723. Because the court agrees with the United States Magistrate that the Commonwealth failed to articulate a neutral reason for challenging one of the six jurors, the habeas corpus petition must be granted.

Although the court adopts the Report and Recommendation, the court has a few remaining concerns. The court recognizes the burden this ruling places on the Commonwealth. As stated in the Respondent's Objections to the Report and Recommendation of the United States

Magistrate, if the Commonwealth chooses to retry the petitioner, the Commonwealth must essentially reconstruct its case from the beginning, including piecing together evidence, locating witnesses, and preparing for trial. However, the disadvantage that may be placed on the Commonwealth cannot be remedied by offending the sound constitutional principles expressed by the United States Supreme Court in Batson v. Kentucky.

In addition, if the Commonwealth has a concern that the ninety (90) day period in which it must retry petitioner is overly burdensome, it may file a motion with the court giving specific reasons why this period should be extended. Should the Commonwealth do so, the court will give the matter due consideration and provide relief where appropriate.

It is so ordered.

LOUIS C. BECHTLE, J.

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM HOWARD HARRISON, Petitioner	:	CIVIL ACTION
vs.	:	
JOSEPH M. RYAN, SUPT., S.C.I. DALLAS, PA, Respondent	:	NO. 87-7439
AND	:	
THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Additional Respondent	:	

REPORT AND RECOMMENDATION

TULLIO GENE LEOMPORRA
CHIEF UNITED STATES MAGISTRATE

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW & DISCUSSION

On November 19, 1987, petitioner, William Howard Harrison, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. This petition asserted that during his jury trial in the Philadelphia County Court of Common Pleas on September 20, 1982, in which he was

convicted of one (1) count of robbery and criminal conspiracy, petitioner:

1. was denied due process when the trial court refused to allow him to proceed as pro se counsel; and

2. was denied equal protection and a fair trial by the prosecutor's use of peremptory challenges at trial.

On August 3, 1988, I recommended that the petitioner's claim regarding waiver of counsel be denied being without merit. As to the petitioner's second contention, an evidentiary hearing was ordered to determine whether the state used its peremptory challenges in a race-neutral way as defined in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). A more complete history of the preliminary facts is contained in my prior Report and Recommendation which is attached to this Report and Recommendation and which was approved by the Honorable Louis C. Bechtle.

The discussion which follows consists of my Proposed Recommended Findings of Fact and Conclusions of Law.

In the trial of this matter, the jury determined that on February 5, 1982, the petitioner, William Howard Harrison, was a conspirator with two (2) other defendants, his brother, James Harrison and his nephew, Donald Harrison, in a robbery of the First Pennsylvania Bank at 1845 Walnut Street in Philadelphia. The defense to the alleged crime was that the petitioner was a passive witness to the bank robbery, not an active participant (Trial Tr. 20). The prosecution's evidence against petitioner was presented by a Detective Robert Kuhlmeir [sic] of the Philadelphia Police Department, who testified concerning statements given to him by both the petitioner and Donald Harrison (Trial Tr. 534-591). The substance of petitioner's statement was that

the Harrison brother who actually robbed the bank had told the petitioner his plans to rob the bank (Trial Tr. 549), and petitioner waited in the car while his brother James was robbing the bank (Tr. 545). The substance of Donald Harrison's statement was that he went into the bank with James, thinking James was going to cash a check (Trial Tr. 557-558), and that it was petitioner's and James' idea to rob the bank (Trial Tr. 561) (see pages 3, 4 and 5 of this report).

The state presented as its witnesses the bank teller (Trial Tr. 428) (who was not able to present any evidence against petitioner), Policemen Fred Short (Trial Tr. 452) and Charles Assman (Trial Tr. 465), Detectives Michael John Duffy (Trial Tr. 470), Richard Bova (Trial Tr. 485), Joseph Falcone (Trial Tr. 522), and Robert Kuhlmeier (Trial Tr. 533), and James Harrison (Trial Tr. 496) (who had

earlier pled guilty to robbery and conspiracy).

The bank teller testified that at 4:45 p.m. on Friday, February 5, 1982, she was working at the teller's window closest to the door of the bank when she saw two (2) men come through the door (Trial Tr. 431-432). One of the men, who she was unable to identify, waited at the brochure rack while the other man (she later identified as James Harrison) came to the window and presented a note which stated "Give me all your money, I have a gun" (Trial Tr. 433). The bank teller did not say she actually saw a gun and there was no testimony that a gun was used in the robbery. The bank teller gave James Harrison all the bills in her top drawer as well as bait money which eventually explodes leaving a red dye on the money (Trial Tr. 433).

James Harrison admitted to robbing the bank, and stated on direct examination that he went into the bank with his nephew, Donald Harrison, and when he left the bank he got into a car in which the petitioner was a passenger (Trial Tr. 496-504). Although James Harrison pled guilty to robbery and conspiracy, he asserted on direct examination that neither his nephew, Donald Harrison, nor his brother, the petitioner, knew of his plan to rob the bank (Trial Tr. 521). Apparently the jury chose not to believe the witness.

On February 6, 1982, at 4:45 a.m., the petitioner alerted Policeman Fred Short that he knew who committed the robbery of the first [sic] Pennsylvania Bank and gave Officer Short some money with red dye on it (Trial Tr. 453-455). The petitioner told Officer Short that one of the males involved in the robbery was

his brother, James, who was waiting for police outside a hotel on 19th and Arch Streets (Trial Tr. 457). James was arrested and $100.00 of the red stained money was retrieved from his wallet by police (Trial Tr. 467-488). Later that same morning, the petitioner gave the following statement to Detective Michael John Duffy:

> "On February 5, 1982, at approximately 5:00 p.m., the witness stated that 'X' and 'Y' came into the apartment, 1301 North 15th Street, second floor rear, and 'Y' was carrying a brown briefcase. 'Y' dumped all this money with the red dye on the floor. He started giving the money, splitting it up between him and 'X'. 'X' gave me one hundred fifty dollars which he owed me.
>
> I know where the money came from because of the red dye and because 'Y' told me that he made a big score.
>
> I called 'X' to the side and said let's go for a walk. We went to the Apollo Hotel, 19th and Arch Streets.

> We got a room and that's when I started talking to him about giving himself up. At this time, 'X' told me that he gave the lady a note at the bank. She gave him a stack of money and he ran out of the bank and the money blew up.
>
> 'X' decided to give himself up and I went to the phone and called the cops. The officer came and picked me up. We road [sic] around the block and I told him 'X' wanted to give himself up.
>
> We drove to the hotel and picked up 'X' outside."

Following James Harrison's arrest on February 6, 1982, the police had continued conversation with the petitioner (Trial Tr. 536-538). Up until February 19, 1982, the petitioner was not a defendant in the case, but only a witness (Trial Tr. 538). On February 19, 1982, petitioner was arrested by Detective Kuhlmeier after giving the following statement, which the Detective read at trial (Trial Tr. 543-551):

"It was Wednesday, 2-3-82. We were sitting up at the house, 'X', 'Y' and me. I cleaned windows at 1717 Spring Garden Street, the Architect Building and they paid me sixty dollars in a check. I was in debt to some people on 15th and Stiles Street.

On Friday 'X' came back and he showed me this check with his name on it. 'Y' had given it to him. It was one of the checks that you have and I think it was for fifty or twenty-five dollars. 'X' came back and pulled me into the bathroom and told me that 'Y' had set him up with the people he sold a ticket to and that they were looking for him to put a hit on him.

He wanted to leave town but he said that he had a way to get the money and square himself. That's when he told me he was going to do the bank but he didn't want me to go in with him and he was going to take 'Y'. He said that 'Z' would take us down in his car and he was high from drinking wine so he wouldn't know what was going on.

We all went down in 'Z's station wagon and he parked on Sansom Street. I think at 20th.

Me and 'Z' stayed in the car and 'X' and 'Y' went around the corner for about ten minutes. They came running back

carrying a brown briefcase with money in it with red stuff on the money. It stunk and 'Y' took the money from who was -- it stunk and 'Y' took the money from who was in the front seat next to 'Z' who was playing with it.

'Z' said what have you got me into? 'X' told him, 'Let's get out of here, I got your money.'

'Y' had the money and the tear gas was hurting our eyes on the way back to the house. When we got back to my house 'Y' jumped out because he had the key. He ran into the door with the money and left us outside.

The kids threw us the keys and we went in. 'Y' had hid the money under the couch and pulled the curtain between the rooms so my mother wouldn't know what was going on. Then 'Y' started counting the money out. It was 'Z', 'X' and 'Y'.

THE COURT: I think there is something left out there.

It was me, 'Z' and 'Y'.

THE WITNESS: Yes, that's right. It was me, et cetera, et cetera.

He said here you go and gave us each some of the money. I got one hundred fifty dollars.

'Z' got three hundred dollars and 'Y' and a girl split the rest up. The real bad stuff (money) was put in a bag and was supposed to have been thrown away.

After it happened, I thought about it and looked at the money. It had the stuff on it. It wasn't real bad but I was thinking about it. We all threw in some money to a pot and went and got high together. That was after 'Z' had gone and after we got high I told 'X', 'Let's go, I want to talk to you.'

Then we went down to the Apollo Hotel, 19th and Arch and rented a room.

I said, 'Look, man, we had better give up because with the money being red and all, the cops are going to catch us anyway.'

Excuse me. I said, 'Look, man, we had better give up because with the money being red and all the cops are going to catch us.'

Anyway, 'X' had put those -- anyway, 'Y' had put those people on 'X' and they would get me if they couldn't get him so I told him let's call the cops. He didn't want to do it. He wanted to go back to the house

and jack 'Y' up because he had more money.

I said, 'You know, 'Y' is loud and he would start screaming and put it on Momma and we would have to kill him.' We didn't want to do that so 'X' said I was right.

I told him to stay there and I went out to get the cops. I went and called the police and they came. The detective came and I went up to him and told him about what had happened and that 'X' wanted to give himself up.

We moved away from the hotel and we came back around and 'X' was standing on the corner and I called him over to the car. The detective said, 'Do you want to give yourself up?' And he said, 'Yes", and they took him. I had given the money I had to the detective --

THE COURT: 'Took him.'

THE WITNESS: They took him. I had given the money I had to the detective what I had left and they took what 'X' had left, too. They took us in here and they got a statement from both of us and then they let me go. But they said to stay available.

Question. Whose idea was it to rob the bank?

Answer. It was 'X's idea and he got everybody else in on it. 'X' didn't know what was going to happen but he got a share of the money at the house.

Question. You knew about the robbery, didn't you?

Answer. Yes, I knew about it. He told me in the bathroom.

The defense chose to present no evidence in its case-in-chief.

Petitioner was convicted in the Philadelphia County Court of Common Pleas, after a jury trial on September 20, 1982, of one (1) count each of robbery and criminal conspiracy, the Honorable Louis G. Hill, presiding. Commonwealth of Pennsylvania v. William Howard Harrison, Nos. 207 and 210, April Term 1982. Post-verdict motions were denied and petitioner was sentenced to not less than ten (10) nor more than twenty (20) years for the robbery conviction, and to not less than five (5) nor more than ten (10) years imprisonment for criminal

conspiracy, to run concurrent to the robbery sentence. Petitioner filed an appeal in the Superior Court of Pennsylvania where the judgment of sentence was affirmed on May 16, 1986. Commonwealth v. Harrison, 556 Pa. Super. 616, ____ A.2d ____ (1986). Petitioner then raised his points for appeal in a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania which denied allocatur on December 29, 1986. Commonwealth v. Harrison, No. 548 E.D. Allocatur Docket 1986.

During the period of time the petitioner's appeals were working in the state system, he filed two federal habeas corpus petitions, April 30, 1984 and February 24, 1987, which were denied and dismissed without prejudice for failure to exhaust state remedies. On November 19, 1987, petitioner filed the instant petition.

This case presents an unusual and interesting procedural scenario. Batson v. Kentucky, supra, was not decided until four (4) years after the petitioner's conviction, and not having had Batson as a guidepost in 1982, the presiding judge at petitioner's trial, the Honorable Louis G. Hill, did not inquire into the motives of the prosecutor in utilizing six (6) of eight (8) available peremptory challenges to strike six (6) blacks from the venire panel (the prosecutor used only six (6) challenges). The petitioner is black.

Batson is to be applied retroactively to cases pending on direct review or those not yet final at the time Batson was decided. Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708 (1987). Batson, however, is not to be applied retroactively to a case on federal habeas corpus review. Allen v. Hardy, 478 U.S. 255, 106

S.Ct. 2878, 92 L.Ed. 199 (1986). The petitioner's case was not final at the time Batson was decided on April 30, 1986, because the Pennsylvania Supreme Court did not deny allocatur to the petitioner until December 29, 1986. Therefore, although this is a habeas corpus petition, Batson should be applied retroactively. See also Teague vs. Lane, Director, Illinois Department of Corrections, et al., No. 87-5292, U.S. Supreme Court, decided February 22, 1989.

In deciding that the Batson rule, although a "clear break" from past precedent, should be applied retroactively, the court stated, "the fact that the new rule may constitute a clear break with the past has no bearing on the 'actual inequity that results' when only one of many similarly situated defendants receives the benefit of the new rule." Id. at 479 U.S. 328, citing United States v.

Johnson, 457 U.S. at 556 n.16. The defendants Batson, Griffith and petitioner were all tried and convicted at about the same time period. Of note in the Griffith opinion was that it left open the question of whether retroactivity should apply to cases on habeas corpus petitions. Id., Justice Powell concurring, p.329. Justice White, in his dissent in Griffith asked why the court would allow a new criminal procedure rule to be retroactive on cases still on direct review but not on collateral review. Id. at 329 citing Allen v. Hardy, supra. "[I]t seems to me that the attempt to distinguish between direct and collateral challenges for purposes of retroactivity is misguided. Under the majority's rule, otherwise identically situated defendants may be subject to a different constitutional rule, depending on just how long ago now-unconstitutional conduct occurred and how quickly cases

proceed through the criminal justice system." Id. at 331.

The rule of Allen v. Hardy, supra, although still viable, applies only to collateral review of convictions that became final before the Batson opinion was announced. The Supreme Court has defined final to mean "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in Batson v. Kentucky." Allen v. Hardy, 478 U.S. at 258 n.1. The petitioner had not exhausted his availability of direct appeal by the time Batson was announced and therefore it was not final. Petitioner's petition for habeas corpus may be heard under the Griffith rule. See Teague v. Lane, Director, Illinois Department of Corrections, et al., supra.

Because the prosecutor's motives in using his peremptory challenges were not determined in any of the state proceedings, it is incumbent on this court to determine the motives through an evidentiary hearing, some six (6) years following the trial.[1] Therefore, the

---

[1]The respondent points to Allen v. Hardy, 106 S.Ct. 278, 2881 (1986), and United States v. Allen, 666 F.Supp. 847, 853, in which the court aptly described the problem in attempting to discover the prosecutor's motives for exercising his peremptory challenges in a criminal trial that took place six (6) years ago:

> Retroactive application would require trial courts to hold hearings, often years after the conviction became final, to determine whether the defendant's proof concerning the prosecutor's exercises of challenges established a prima facie case of discrimination. Where a defendant made out a prima facie case, the court then would be required to ask the prosecutor to explain his reasons for the challenges, a task that would be impossible in

(Footnote Continued)

district court in this instance must determine whether the prosecutor's use of peremptory challenges creates a prima facie case of discrimination, Batson, 106 S.Ct. at 1723, and whether the prosecutor has articulated race-neutral reasons for the peremptory challenges. Id.

Initially, we must address whether a prima facie case of purposeful discrimination has been made by the prosecutor's use of peremptory challenges at the petitioner's trial.

(Footnote Continued)
virtually every case since the prosecutor relying on Swain would have no reason to think such an explanation would someday be necessary.

Further adding to this difficulty is the fact that the prosecuting attorney, Charles Cunningham, had conducted over 100 jury trials at the time of this case, and by the time he retired from the Philadelphia District Attorney's Office in 1986, he had conducted over 200 jury trials.

In order for petitioner to establish a prima facie case of discrimination, petitioner must show he is a member of a cognizable racial group and the prosecutor has exercised peremptory challenges to remove members of petitioner's race from the venire panel. Batson, 476 U.S. at 96, 106 S.Ct. at 1723, citing Castaneda v. Partida, 430 U.S. 482, 494, 97 S.Ct. at 1280 (1977). The facts established during the evidentiary hearing showed the petitioner to be black, and that six (6) of six (6) peremptory challenges were used by the prosecution to strike black venirepersons (Evidentiary Hearing (EH), October 5, 1988, p.5). It has been clearly established that blacks are members of a cognizable racial group. Peter v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed. 2d 83 (1972).

"Second, the defendant is entitled to rely on the fact, as which

[sic] there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"

"Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the venireman [sic] from the petit jury on account of their race." Batson v. Kentucky, 476 U.S. at 96.

Based on the above-stated criterion, it is clear that petitioner has established a prima facie case of purposeful discrimination. The petitioner is black and all six (6) of the venirepersons the prosecutor peremptorily challenged were black (EH, 10/5/88, p.17). The record indicates that the jury consisted of eleven (11) white [sic] and one (1) dark-skinned Indian (EH, 10/5/88, pp.

41-42; see petitioner's testimony at pp.55-56).[2]

> If all of the jurors of defendant's race are excluded from the jury, we believe that there is a substantial risk that the Government excluded the jurors because of their race. Our holding helps to avert that risk by requiring the Government to explain the reasons for its challenges when no members of a defendant's race are left on the jury.

United States v. Chalen, 812 F.2d 1302, 1314 (10th Cir. 1987).

A prima facie case of discrimination having been established, the burden shifts to the prosecutor to give race-neutral reasons for having peremptorily stricken the six (6) jurors. Batson, 476 U.S. at 96, 106 S.Ct. at 1723. Normally,

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[2]In Chief Justice Burger's dissent in Batson, 476 U.S. 130, he notes the problems courts face in reconstructing the race of the jury panel: "[e]ven after a 'record' on this issue has been created, disputes will inevitably arise."

a federal habeas corpus petitioner has the burden of proving all facts entitling him to a discharge from custody. Brown v. Cuyler, 669 F.2d 155 (3d Cir. 1982), citing Goins v. Brierley, 464 F.2d 947, 949 (3d Cir. 1972). It has been recognized, however, that "with respect to certain factual issues, the burden of proof may be shifted to the state because of specific policy considerations or because the available evidence is likely to be in the hands of the state." Id. at 949. In dealing with Batson issues, once the petitioner has established a prima facie case of discrimination, the burden shifts to the prosecutor to give race-neutral reasons for having peremptorily stricken the jurors. Batson, 476 U.S. at 96, 106 S.Ct. at 1723.

In this case, the trial court did not pursue a Batson analysis (because there was no Batson analysis to pursue in

1982) and, therefore, this court is acting as the finder of fact.

For the selection of the first ten (10) jurors, Judge Hill conducted the voir dire. A twelve-person venire panel was first put into the jury box and they were questioned by Judge Hill. Following the questioning, Judge Hill asked the lawyers if they had any questions. The lawyers all declined the invitation to ask questions (Trial Tr. 279). Four (4) persons were selected for the jury from this panel. Eight (8) people were then brought into the courtroom to be questioned by Judge Hill. Following Judge Hill's questions, he once again asked the attorneys if they had any questions, and again none of the attorneys asked questions. Seven (7) of these eight (8) jurors were accepted. After the first eleven (11) jurors had been accepted, Judge Hill allowed the lawyers themselves

to conduct the voir dire. Fourteen (14) jurors were eventually chosen, two (2) as alternate jurors. Of the six (6) jurors peremptorily stricken by the prosecution, only two (2) were directly questioned by the attorneys (Rudolph Gray (Trial Tr. 322) and Alma Nottingham (Trial Tr. 337)). The defense did not use their peremptory strikes.

The facts established during the evidentiary hearing are as follows:

The prosecutor utilized six (6) of his eight (8) available peremptory challenges to exclude black persons from the petitioner's jury (the prosecutor used only six (6) peremptory challenges). The jurors stricken were (1) Richard Edwards, (2) Sammy Toney, (3) Alice Wright, (4) Stanley Logue, (5) Rudolph Gray, Sr., and (6) Alma Nottingham.

At the October 5, 1988 evidentiary hearing, the prosecuting

attorney in Commonwealth v. Harrison, former Assistant District Attorney Charles J. Cunningham testified first to his general rationale in selecting a jury and then gave his reasons for striking the particular jurors. Cunningham testified that when he picks a jury, he tries to find people who will agree with him and agree with each other so that "they could reach a unanimous verdict" (EH, 10/5/88, pp.6-7). Cunningham stated that he wants the jury he picks to be able to hand down a conviction, so he looks to whether a potential juror or a family member of the potential juror was someone "who had spent time in prison, having been convicted of a serious crime" (EH, 10/5/88, p.8). Cunningham further noted that he takes into consideration a potential juror's employment history and educational level. "A good employment history show a stable lifestyle" and "their education tells me

something about the way they think" (EH, 10/5/88, p.9). He stated that while in the District Attorney's office, he tried over two hundred (200) jury trials. At the time of the petitioner's trial, he estimated he had tried over one hundred (100) jury trials.

Cunningham testified that he did not specifically remember this case but that his memory would be refreshed by referring to four (4) pages of handwritten notes made contemporaneously with the voir dire process of the petitioner's trial (EH, 10/5/88, pp.10-11). These notes were marked into evidence. These notes were used by Cunningham to record juror responses to questions during the voir dire, and so that he could keep "a running count of peremptory challenges and whether they were excused." He also explained certain marks on the notes: "jurors that are accepted, I circled the number and their

position in the box. Jurors that are excused or stricken, ... I have a line through their name or number...." (EH, 10/5/88, p.11).

By referring to both his notes and the trial transcript, Cunningham testified as to the reasons he struck the individual jurors. For each individual juror questioned in the voir dire, Cunningham recorded notes "reflecting answers that [he] thought were important to [his] decision as far as accepting or rejecting the juror" (EH, 10/5/88, p.13).

(1) As to Richard Edwards, Cunningham wrote the words "56, 11th grade, in South Carolina, Wynnefield, 16 years, unemployed truck driver, three kids" (EH, 10/5/88, p.14). Cunningham had written an "O.K." under this juror's name meaning that Cunningham had initially decided to accept him as a juror, but subsequently decided to strike him (EH,

10/5/88, p.14). By referring to page 249 of the trial transcript, Cunningham reasoned that he subsequently struck Edwards because his oldest son had been arrested in a bank for carrying a .357 magnum. "I didn't even bother writing down in the notes the business about the gun. That tells me that as soon as I heard about the gun, I decided I didn't want him" (EH, 10/5/88, pp.15-16).

(2) As to Sammy Toney, Cunningham noted "56; South Carolina; tenth grade, North Philadelphia 28 years; laid off construction" (EH, 10/5/88, p.19). Cunningham could not remember why he struck this juror but guessed that, "It could have been as simple as he and Mr. Edwards sitting next to each other in the jury box. They're both 56 years old, they're both from South Carolina. If the two of them were getting along well, I would not keep Tammy [sic] Toney after I

had stricken Richard Edwards. Having knocked his friend off the jury, I wouldn't keep him. But I don't recalll [sic] if that was the case" (EH, 10/5/88, p.20).

(3) The third Commonwealth peremptory challenge was utilized against Alice Wright. Again, written in his notes, the word "O.K." is circled underneath this juror's name, and only after hearing responses to voir dire questions did he draw a line through her name indicating that he rejected her. These words were within his notes, "Georgia, West Philadelphia 22 years; lived alone; her son was a retired police officer" (EH, 10/5/88, p.21). Cunningham was not able to remember why he decided to strike her as a juror. "Just looking at these notes, I don't know. I don't have her age down here. The fact that her son is a retired police officer, I assume she is an older

woman. That could have been a factor; I don't know" (EH, 10/5/88, p.22). The record indicates that Alice Wright was seventy (70) years old at that time (see discussion herein).

(4) As to Stanley Logue, Cunningham recorded in his notes that this potential juror was thirty-five (35) years old, had two (2) years of liberal arts education at Temple University, and was from Southwest Philadelphia. Cunningham cited his reason for not accepting Logue as a juror: "liberal arts majors are not good prosecution jurors. They're too inquisitive; they look for doubt. That's the nature of liberal arts education.... He's a person who might go back in jury deliberations and raise issues that the lawyers have not even considered, had not presented, which is the most difficult kind of juror, because you can rebut what the other lawyer is doing. You can't

rebut what the jurors are thinking on their own and are liable to bring up in jury deliberations" (EH, 10/5/88, p.23).

(5) The fifth Commonwealth peremptory challenge was exercised against Rudolph Gray, Sr. Cunningham wrote in his notes "Roxborough; Conrail, his wife equal Sears, meaning his wife works at Sears, and interfere." Referring to the September 15, 1982 voir dire notes (p.323), Cunningham remembered he struck this potential juror because he had been arrested for interferring [sic] with a police officer. "[I] would not as a D.A. want a juror who had been arrested himself. He would more likely be critical of the police, more likely be sympathetic toward the defendant, and it's just not the type of juror that you want" (EH, 10/5/88, p.25).

(6) The sixth Commonwealth peremptory challenge was Alma Nottingham.

The District Attorney's notations reflect that she was married, lived in Southwest Philadelphia and worked in sales at Woolworths. He also wrote "daughter = cab." Cunningham was not able to reconstruct from his notes the reasons for striking her, but by referring to page 340 of the trial transcript, he was able to infer that she was stricken because she was being tentative as to whether or not she could be a good juror (EH, 10/5/88, p.27).

Upon cross-examination, Cunningham asserted his conclusion that Alma Nottingham was being tentative was based on the following exchange which took place at page 340 of the trial transcript:

> Q. Any reason why you could not be fair to both the defendants and the prosecution in this case?
>
> A. I don't think so. I could probably be fair.

Q. You seem to hesitate a little bit.

A. I hope to anyhow.

Q. You seem to hesitate a little bit. Any reason?

A. No, no reason. I'll come to a fair judgment for both of them.

DISCUSSION OF LAW

Once a prima facie case of discrimination in jury selection has been shown, a prosecutor has the burden to come forward with race-neutral reasons to explain the peremptory challenges. Batson, 476 U.S. at 96, 106 S.Ct. at 1723. The prosecutor's explanation need not rise to the level of exercise of a challenge for cause. McCray v. Abrams, 750 F.2d 1113, 1132 (2nd Cir. 1984); Booker v. Jabe, 775 F.2d 762, 773 (6th Cir. 1985). In order to rebut the defendant's prima facie case of purposeful discrimination, "[t]he prosecutor ... must articulate a neutral explanation related to the

particular case to be tried." Batson, supra at 98. "The prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges. Batson, supra at 98 n.20. The case upon which Justice Powell most relied in writing the opinion of the Court in Batson, attempted to define the standard as requiring the prosecutor to show "genuine reasons other than group affiliation" or "some slight bias that would not support a challenge for cause." McCray v. Abrams, supra at 1130. By reading Batson alone, the standard seems to be one where the prosecutor must be able to articulate explanations which are "neutral"; "clear and reasonably specific"; "legitimate", and "genuine", yet not rising to a level for challenge for cause.

However, as then Chief Justice Burger noted in his dissent of Batson,

"[a] 'clear and reasonably' specific explanation of 'legitimate reasons' for exercising the challenge will be difficult to distinguish from a challenge for cause." Id. at 127. Furthermore, Justice Marshall warned in his concurring opinion of Batson, "[w]hen a defendant can establish a prima facie case, the trial courts are forced [sic] with the difficult burden of assessing prosecutors' motives." Citing King v. County of Nassau, 581 F.Supp. 493, 501-502 (E.D. N.Y. 1984). "Any prosecutor can easily assert racially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons." Id. at 105-106.

The federal circuit courts have helped to define the standard by identifying those reasons posed by the prosecutor in striking a juror (once the prima facie case is established) and whether those reasons were "race-neutral" in light of

Batson.[3] Other than a review of these

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[3]1st Circuit - United States v. Angiulo, 847 F.2d 956 (1988) (court held peremptory challenges not racially motivated where the reasons given were one juror had provided false or misleading statements in response to the government's questionnaire; another had answered questions in a "flip" manner; another struck because of a recent move and the care of a small child would be too distracting thought the prosecutor; and a fourth juror was from a small town where a member of the defendants resided).

2nd Circuit - Roman v. Abrams, 822 F.2d 214 (1987) (court refused to believe the prosecutor proffered reason that he struck juror because the potential juror's knowledge of electronics, bookkeeping, and computers justified their exclusion because such knowledge might prevent the juror from accepting the reasonable doubt standard of proof).

4th Circuit - United States v. Garrison, 849 F.2d 103 (1988) (court held it was a racially neutral reason to strike two black women because they chatted with each other during the voir dire process and gave other indications of boredom and disdain for the process). See also United States v. Woods, 812 F.2d 1483 (1987) (court held that black juror appropriately excused because he was a Charleston resident, and the prosecutor contended the

(Footnote Continued)

cases, and the words of Batson itself, we

(Footnote Continued)
"Charleston Chronicle" was biased and unfair in its comments on the case.

5th Circuit - United States v. Forbes, 816 F.2d 1006 (1987) (the hostile posture/demeanor of one juror and fact that another panel member's children had experienced trouble with the law were permissible reasons under Batson.

7th Circuit - United States v. Mathews, 803 F.2d 325 (1986) (the court held the prosecutor gave racially neutral reasons where jurors were peremptorily challenged because one expressed reservation in adequately appraising tape recorded evidence and another was late for the voir dire and was inattentive during voir dire process evidencing a lack of commitment to the prosecutor).

8th Circuit - United States v. Cloyd, 819 F.2d 836 (1987) (prosecutor stated reason that he peremptorily struck juror because the juror was familiar with Daily Liquor Store, the place where the defendant was expected to claim he was during robbery was sufficient). See also United States v. Love, 815 F.2d 55 (1987) (court held prosecutor's reason was sufficient in striking juror that had heard of business owned by one of the witnesses).

9th Circuit - United States v. Lewis, 837 F.2d 416 (1988) (court held that

(Footnote Continued)

are given no other guidelines to determine whether D.A. Cunningham's proferred [sic] reasons rise to the level required by Batson. We also have no reason to conclude that D.A. Cunningham exercised purposeful discrimination or that his motives and creditability [sic] are suspect.

Considering solely the reasons Cunningham gave for striking the jurors in

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(Footnote Continued)
venireperson's age and lack of family may have appeared relevant to prosecutor in a case involving child abuse and could be deemed racially neutral).

10th Circuit - United States v. Chalan, 812 F.2d 1302 (1987) (general reference to juror's unsatisfactory background and unspecified dissatisfaction with answers in juror's questionnaire fail to satisfy Batson).

11th Circuit - United States v. David, 844 F.2d 769 (1988) (court held racially neutral reasons for striking black jurors where reasons were one was pregnant, another was an employee in the federal government, and one's son was on probation).

question, without comparing the stricken jurors with those eventually empanelled on the petit jury, those reasons appear race-neutral. He struck Edwards because his oldest son had been arrested in a bank. In United States v. Vaccaro, 816 F.2d 443 (9th Cir. 1987), the fact that a juror had a brother in prison for a robbery conviction was deemed to be a race-neutral reason for striking that juror. In United States v. Cartlidge, 808 F.2d 1064 (5th Cir. 1987), the court held it was a race-neutral reason for the prosecutor to peremptorily challenge a juror whose brother had been convicted of robbery. Furthermore, this court finds the fact that Cunningham had initially signalled this juror as "OK" (meaning he would accept him), and struck the juror only after hearing about the man's son's conviction, is a strong inference that

Cunningham was not striking the juror because of his race.

Cunningham stated that he struck Toney because he had stricken Edwards, who had a lot in common with Toney, and the two men might have struck up a friendship. See United States v. Garrison, 849 F.2d 103 (4th Cir. 1988), (wherein [sic] a similar situation, the prosecutor's reasons for striking two seemingly friendly jurors, was [sic] deemed non-racial). The essence of Cunningham's reason was that he didn't want Toney to hold a grudge against him for having stricken his friend. Cunningham had testified at the evidentiary hearing that he wanted as jurors "people who responded well to me as opposed to responding well to defense counsel and poorly toward me" (EH, 10/5/88, p.7). Considering the above reasons, and the nature of peremptory

challenge [sic],[4] this court finds the reason for striking Toney racially neutral.

As to Wright, Cunningham was unable to remember why he struck her, but surmised it may have been because she was too old (EH, 10/5/88, p.22). In United States v. Cartlidge, supra, the fact that one stricken juror was young, single, and unemployed, was deemed to be racially neutral. Wright was a juror that Cunningham had initially thought to be acceptable ("O.K." was written in his notes) and through the passing of six (6) years is no longer able to remember why he

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[4]What is the nature of the peremptory challenge? "[A] prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all', as long as that reason is related to his view concerning the outcome of the case to be tried...." United States v. Braun, 817 F.2d 674 (10th Cir. 1987), citing Batson, 106 S.Ct. at 1718-1719.

eventually chose to strike her. Just as in Edwards' case, the initials "O.K." written in the prosecutor's notes dissipates the inference that the prosecutor struck this juror solely because of race. Batson requires the prosecutor to articulate a race-neutral reason, and the prosecutor has done this by citing the fact that Wright was "old" (EH, 10/5/88, p.22). The record indicates she was seventy (70) years old. However, see final review of notes herein.

Cunningham stated Logue was stricken because his liberal arts education background was likekly [sic] to arouse an inquisitiveness that a prosecutor would not like to have in a juror. Cunningham thought Logue might "go back in jury deliberations and raise issues that the lawyers have not even considered." This appears to be a race-neutral reason.

Cunningham struck Gray because he had previously been arrested for interfering with a police officer. As in the case concerning stricken juror Edwards, it has been recognized by the courts that peremptorily striking a juror because the juror or a member of the juror's family has been convicted of a crime is a racially neutral reason. See United States v. Vaccaro, supra; United States v. Cartlidge, supra. Therefore, the prosecutor satisfied his burden of posing racially neutral reasons for striking juror Gray.

Cunningham asserted that his reason for striking Nottingham was that he sensed she was being tentative in response to voir dire questions which probed whether she was able to be a "fair juror (EH, 10/5/88, p.27). In United States v. Cartlidge, supra, the Fifth Circuit determined that a proper race-neutral

reason for striking a juror was that she "avoided eye contact" when being questioned. It has also been deemed an appropriately race-neutral reason to strike a juror because she was nervous about whether or not she could make the right decision. United States v. Hawkins, 781 F.2d 1483 (11th Cir. 1986). Furthermore, the Ninth Circuit in United States v. Vaccaro, supra, recognized an appropriate race-neutral reason to be that the juror exhibited a poor attitude in answering voir dire questions. Therefore, this court finds that the prosecutor's feeling that Nottingham was unsure as to whether she could be a fair juror is a race-neutral reason for striking her.

Yet, our analysis must go deeper than simply examining the reasons Cunningham proferred for striking the six (6) black venirepersons. All relevant circumstances must be considered, such as

the prosecutor's questions and statements during voir dire, United States v. Clemons, 843 F.2d 741 (3d Cir. 1987); the prosecutor's use of the voir dire process to determine whether his concerns with the venirepersons were real, United States v. Brown, 817 F.2d 674 (10th Cir. 1987); and whether the characteristics which prompted the peremptory strikes are similar to those characteristics of the empanelled jurors. United States v. Wilson, 853 F.2d 606, 610 (8th Cir. 1988). If this court finds that even one (1) juror was stricken, in violation of Batson [sic],[5] then

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[5] Batson, Marshall concurring at 476 U.S. 105-106:

> "[W]hen a defendant can establish a prima facie case, trial courts face the difficult burden of assessing prosecutor's [sic] motives. See King v. County of Nassau, 581 F.Supp. 493, 501-502 (E.D. N.Y. 1984).
> (Footnote Continued)

the motion for habeas corpus must be granted. United States v. David, 803 F.2d 1567, 1569 (11th Cir. 1986).

The petitioner urges in his brief that the prosecutor failed to

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(Footnote Continued)
Any prosecutor can easily assert racially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant, see People v. Hall, 35 Cal.2d 161, 672 F.2d 854 (1983), or seemed 'uncommunicative', King, supra at 498 or 'never cracked a smile' and, therefore, 'did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case,' Hall, supra at 165, 672 F.2d at 856. If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the court today may be illusory."

explore his concerns with the challenged jurors on voir dire. Furthermore, petitioner asserts the white jurors accepted were similar in those characteristics which led to the striking of the black jurors. No explanation is given by petitioner as to why the two (2) defense counsel did not strike the objectionable white jurors because of purportedly objectionable characteristics or in the exercise of their peremptory challenges.

For instance, the prosecutor struck Edwards because his oldest son had been arrested for carrying a gun inside a bank. However, three (3) of the white jurors accepted had a family member who was convicted of a crime (Monica Bishop - husband on probation for assault [Trial Tr. 290-292]; Patricia Cantz - brother arrested for selling marijuana [Trial Tr. 315-316]; and William Lloyd - son arrested for drunk driving [Trial Tr. 295]). When

asked in cross-examination (at the evidentiary hearing) as to why he did not strike any of these white jurors, Cunningham stated that, "minor drug offenses, traffic violations ... and assaults, provided they're not serious assaults, fall into the category of minor offenses" (EH, 10/5/88, p.50). The petitioner goes on to argue that Cunningham did not adequately explore in voir dire the details of the three (3) white jurors' relatives' experience with police and the courts, in order to conclude that the offenses were minor. The respondent further argues that Edwards' son's conviction was "minor" also in that Edwards answered in voir dire that his son was merely fined as a result of the incident. Accepting both of the respondent's arguments as true, this court finds that the similarities between the crimes of Edwards' son and the alleged crime of

the petitioner were enough to infer that Edwards was stricken for a non-racially motivated reason. Edwards' son was convicted of possessing a .357 magnum in a bank. The petitioner was being tried for a bank robbery involving the threat of a gun. Furthermore, Cunningham stated that he belived Edwards was not being entirely truthful concerning the details of his son's crime and conviction: "I had the impression that Mr. Edwards either didn't know the whole story or wasn't telling us the whole story. That he was trying to minimize what had happened to his son" (EH, 10/5/88, p.40).

The reason for striking Edwards given by Cunningham was racially neutral. "In order to have a neutral explanation, the characteristics of the struck individual cannot be present in those white panel members not struck by the government." United States v. Wilson, supra at 610.

None of the three (3) white panel members' relatives were arrested for or convicted of a crime in any way similar to the crime for which the petitioner was being tried, but the conviction of Edwards' son was very similar and, therefore, the strike was acceptable.

The respondent almost concedes that the prosecutor's strike of Gray was racially neutral. Gray was stricken, Cunningham testified, because he himself had been arrested for interfering with a police officer. The respondent is not able to point to any of the white jurors eventually accepted who, themselves, were convicted of a crime, much less arrested for inteferring [sic] with police. Therefore, the striking of Gray was also racially neutral.

Logue was struck because he had been a liberal arts major at Temple University. The respondent argues that

this would be a racially neutral reason except for the fact that Logue actually attended only two (2) years of college and failed to go on to use his liberal arts education by taking a job as a medical authorizer for the Social Security Administration (Trial Tr. 301). Additionally, the respondent argues that three (3) of the white jurors had a greater education than Logue, and although no evidence of it exists in the record, argues that each of the three (3) must have had more liberal arts type training than Logue (Rachel E. Livezey was a teacher; Thomas Thakadipparumpil had obtained a college degree in mathematics in India; and Randall E. Slimak was a third year medical student). Accepting as true the petitioner's argument that these three (3) accepted jurors had as much or more of a "liberal arts" type training than Logue, then, on this basis, Cunninghams' [sic]

rationale may have been faulty. However, Logue is the only venireperson of the four (4) mentioned above who described his educational background as one of "liberal arts". Even though Cunningham's reasoning may have been faulty, such a fault does not destroy his credibility to the point that we could say his reason for striking Logue was racially motivated.

Furthermore, there were reasons for Cunningham to not strike Slimak, despite the extensiveness of his education. In response to whether he had a friend or relative in law enforcement or the court system, Slimak responded: "Well, I have two friends, very close friends. One works for the D.A.'s Office, a lawyer, and another friend, an acquaintance, is a police officer" (Trial Tr. 309). Certainly a prosecutor would want this juror and one wonders why defense did not strike him. The selection of Thakadipparumpil

was also consistent with Cunningham's philosophy in picking a juror when education is a factor: "their education tells me something about the way they think. Do they think in concrete terms, or are they inquisitive? They're things that you can infer from their education" (EH, 10/5/88, pp.8-9). It is more difficult to reason why Cunningham selected Livezey and not Logue. Nevertheless, there does [sic] exist differences between the two. Although Livezey stated she was a graduate of Wesleyan College with a degree in education, she never said she studied "liberal arts." However, this argument takes on less significance when the fact is presented that neither Cunningham nor any other lawyer asked questions during voir dire following the trial judge's questioning, and apparently the white jurors were acceptable to all counsel. It

is only at this time as a matter of proof under Batson do they become suspect.

The Third Circuit has pointed out in United States v. Clemons, supra at 749, that the Batson Court "[c]ondemned the practice of abusing peremptory challenges to further discriminatory ends, [yet] it reaffirmed the importance of peremptory challenges as a trial procedure, and declined an invitation to abolish the process." Citing Batson, supra at 1724 and n.22. To say that the striking of Logue was discrminatory [sic] because Livezey was accepted would be moving towards the abolition of the peremptory challenge. There is no evidence on either side to indicate why one or the other was more or less acceptable.

Cunningham utilized a peremptory strike against Nottingham because she seemed to be "tentative" about whether she could be a good juror (EH, 10/5/88, p.27).

The petitioner contends that two (2) other white venirepersons, accepted onto the jury, were similarly tentative. The relevant portions of the voir dire transcript are set out below.

> A) Alma Nottingham (Trial Tr. 340)
>
> Q. Any reason why you could not be fair to both the defendants and the prosecution in this case?
>
> A. I don't think so. I could probably be fair.
>
> Q. You seem to hesitate a little bit.
>
> A. No, no reason. I'll come to a fair judgment for both of them.
>
> Q. The Judge is going to instruct you that the defendants are considered innocent until proven guilty. Would you be able to follow those instructions?
>
> A. I'm pretty sure I will be.
>
> Q. You're pretty sure?

A. Yes.[6]

B) Monica Bishop (Trial Tr. 292-293)

Q. Do you feel any hostility or annoyance at the District Attorney's Office, the police, any of the authorities for this incident that resulted in your husband being convicted and put on probation for this?

A. No.

Q. You don't?

A. No.

Q. What's that?

A. I don't think so.

Q. If you're selected to sit on this jury, will you listen carefully to the evidence?

A. Yes.

Q. Will you do your very best to be fair to each of the two defendants in this case?

A. Yes.

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[6]This questioning was conducted by Brian R. Williams, Esquire, counsel for the defendant Donald Harrison.

Q. Will you do your very best to be fair to the Commonwealth of Pennsylvania represented by the district attorney over here?

A. Yes.[7]

C) Margaret Matkowski (Trial Tr. 299)

Q. If you're selected to sit on this jury, will you listen carefully to the evidence?

A. Yes.

Q. Will you decide the case only on the evidence and not on any sympathy, favoritism or prejudice?

A. (No response).

Q. You have to say yes or no because he has to write it down.

A. Yes.

Q. If you are selected, will you do your very best to be fair to each of the two defendants?

A. Yes.

Q. And to the Commonwealth?

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[7]The trial judge, the Honorable Louis G. Hill, conducted this questioning.

A. Yes.[8]

Attempting to reconstruct a juror's tone of voice, inflection, demeanor, attitude, or truthfulness through the use of a transcript is impossible. However, even by viewing the transcript alone, it is reasonable to suspect that Nottingham may have been "tentative". By viewing the transcript it seems that Nottingham's demeanor was such to prompt further questioning from defense counsel because she seemed hesitant.

D.A. Cunningham stated that he could not remember clearly why he peremptorily challenged Toney or Wright. Cunningham had been able to recall why he struck the other four (4) jurors.

It has been very difficult to determine whether or not the striking of

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[8] Id.

Toney was racially motivated. As stated earlier in this opinion, the reason given by Cunningham for striking Toney was racially neutral on its face. It was based solely on his intuition that Toney, who was sitting next to the stricken juror Edwards, was becoming friendly with Edwards because they were the same age and both from North Carolina. Cunningham reasoned that Toney could hold a grudge against the prosecutor for having stricken his friend, Edwards. The petitioner argues that this explanation is illogical because Toney had no way of knowing which attorney excused Edwards, being the peremptorily [sic] challenges were made anonymously. The Supreme Court has enunciated in Batson that once a prima facie case of discrimination is established, it is the prosecution's burden to come forward with a neutral explanation for challenging the black

jurors (476 U.S. at 97). "The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried." Batson, 476 U.S. at 98. The explanation given by the prosecutor must be clear, reasonably specific and legitimate. Batson, 476 U.S. at 98, n.20, citing Texas Department of Community Affairs v. Burdine, 450 U.S. at 258.

Even in United States v. Garrison, supra (see footnote 3), other facts existed other than that the two woman [sic] jurors seemed friendly. They also seemed bored, chatted with one another during voir dire, and showed general disdain for the entire process.

As mentioned earlier in this opinion, it is understood how difficult it must be for Cunningham to remember why he peremptorily struck a juror six (6) years before. It is not at all clear that Cunningham had a discriminatory motive in

striking Toney. However, Cunningham explained his reason. It was clear and reasonably specific and, except for the fact that the juror was black, legitimate. The petitioner presented no evidence as to this juror, no witnesses, no attorneys, nothing except reasonable argument which requires us to go beyond what is before us and find purposeful discrimination merely on petitioner's argument. While I am not overwhelmed with the prosecutor's logic, there was little contradictory evidence to question the difficult standard that Batson requires.

Under the Batson standard, the peremptory challenge of Wright is more complicated as an evidentiary matter. Cunningham suggested that he might have stricken Wright because she was too old. She had testified in voir dire that she was seventy (70) years old. The entirety of Cunningham's direct testimony

concerning the striking of Alice Wright in the evidentiary hearing is as follows:

Q. All right.

I'd like to next direct your attention to juror number 698, Alice Wright.

Yes. That was the third --

THE COURT: The last name?

MS. CHAMBERS: Wright, W-R-I-G-H-T.

THE WITNESS: That was the third Commonwealth peremptory challenge. Although, again, with Alice Wright, I had written down O.K., then her answers, the ones that I had recorded were that she was from Georgia, West Philadelphia 22 years; lived alone; her son was a retired police officer.

Q. Now, the notation O.K. would mean what to you at this time?

A. That means that she was okay. I was going to take her as a juror, that I was going to accept her.

Q. All right. But you did not, obviously.

A. Right.

Q. And what if you can, tell us what would be the reason that you would strike her?

A. I don't know.

Q. You don't have a present recollection, is that correct?

A. That's right.

Q. I guess my question would be: Given this kind of a history that you noted for her and your initial impression that you would accept her given your practice in voir dire, what kind of reason would you have to strike someone, to strike a juror?

MS. KOLLER: Objection. It calls for speculation as to why he didn't know why he struck this juror.

MS. CHAMBERS: If I may, we're trying to reconstruct a trial.

THE COURT: I'll hear the answer.

THE WITNESS: Just looking at these notes, I don't know. I don't have her age down here. The fact that her son is a retired police officer, I assume she is an older woman. That could have been a factor; I don't know.

The difficulty with this peremptory strike is his several answers that he did not know why he struck her and he did not have a present recollection. Certainly under those circumstances the evidence fails to satisfy the evidentiary standard of Batson requiring a "clear", "reasonably

specific", "legitimate" and "neutral explanation".

It is true that he had marked this juror "OK" but then struck her. If it was his opinion that she was too old, there is nothing in the evidence to contraduct [sic] that. That was his judgment. Merely being seventy (70) years old does not contradict that. Petitioner argues that three (3) white jurors were in their sixties. The fact that three (3) white jurors were in their sixties does not mean that they were too old. Obviously a numerical age has its significance in some instances, but merely a numerical age does not lead to a conclusion that a person is too old to serve on a jury regardless of their race. Anyone [sic] of the jurors could have been too old in the mind of the prosecutor for many reasons other than a numerical age. Certainly the mother of a retired police

officer would be the type of juror who a prosecutor could easily expect to support his point of view, whether she was black or white.

The reason why I must reject this explanation is not because of age but because the prosecutor could not recall his reason. The testimony which I credit is summarized by his repeated statement "I don't know." Since this is not a satisfactory explanation under Batson, I conclude the evidence is not acceptable and the Commonwealth has failed to meet the standard.

I do not believe that D.A. Cunningham utilized his peremptory challenges in a discriminatory manner, but only that he failed to satisfy the Batson test. It is also clear from a review of the trial record that the evidence at trial against petitioner was overwhelming and that he was not prejudiced by the

peremptory challenges. A jury, whether black or white, could easily have found him guilty of the charges.

In this case, following the rule of Batson and its consequences, we must order a new trial. A new trial is necessary eventhough [sic] the evidence against the petitioner is clear and his guilt admitted by his own statement introduced at trial. It would have been unusual for any juror to ignore the evidence of guilt. It is at this point Justice Stevens suggests a different standard in Teague v. Lane, Director, Illinois Department of Corrections, et al., supra, which I quote:

> "When a criminal defendant claims that a procedural error tainted his conviction, an appellate court often decides whether error occurred before deciding whether that error requires reversal or should be classified as harmless. I would follow a parallel approach in cases raising novel questions of constitutional law on collateral review, first determining whether the trial process violated any of the petitioner's constitutional rights and then

> deciding whether the petitioner is entitled to relief. If error occurred, factors relating to retroactivity -- most importantly, the magnitude of unfairness -- should be examined before granting the petitioner relief. Proceeding in reverse, a plurality of the Court today declares that a new rule should not apply retroactively without ever deciding whether there is such a rule.

Id. at 2, Slip Opinion, Justice Stevens concurring in part and concurring in judgment.

RECOMMENDATION

I recommend that the Writ of Habeas Corpus requested under 28 U.S.C. § 2254 be GRANTED and that petitioner be retried within ninety (90) days from the court's final order or be released.

TULLIO GENE LEOMPORRA
CHIEF UNITED STATES MAGISTRATE

I. QUESTION PRESENT FOR REVIEW

Was the district court's finding that the prosecution failed to rebut a prima facie case of racial discrimination in jury selection clearly erroneous where as the prosecutor's had used his peremptory challenges exclusively to strike six black venirepersons, where the reasons given for striking some black venirepersons were weak, and where the prosecutor failed to articulate a racially neutral reason for the peremptory challenge to one black venireperson?

II. PARTIES TO THE APPEAL TO THE COURT OF APPEALS

William Howard Harrison was the habeas petitioner in the district court and the appellee in the Court of Appeals for the Third Circuit in Appeal Number 90-1185. Harrison was cross-appellant in Appeal Number 90-1220 which appeal was dismissed as moot due to the Court of Appeal's decision in Appeal Number 90-1175.

Appellants in the court below in Appeal Number 90-1175 (and cross-appellee's in Number 90-1220) were Joseph M. Ryan, Superintendent, State Correctional Institute at Dallas, Pennsylvania, the Attorney General of the State of Pennsylvania, (presently Ernest G. Preate, Jr.) and Ronald D. Castile, District Attorney, Philadelphia, Pennsylvania.

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V. REPORTED OPINION

The opinion of the Court of Appeals for the Third Circuit in support of its order dated July 25, 1990 affirming the district court's granting of the petition for writ of habeas corpus is reported at 909 F.2d 84. The opinion is set forth in the appendix prepared by petitioners at A-1 to A-18.

VI. STATEMENT OF JURISDICTION

This Court has jurisdiction to review the Court of Appeals' affirmance of the granting of the petition for writ of habeas corpus pursuant to 28 U.S.C. §1254(1).

VII. CONSTITUTIONAL PROVISION INVOLVED

The issue presented by the petition for writ of certiorari involves the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution:

No state shall...deny to any person within its jurisdiction the equal protection of the laws.

VII. COUNTER-STATEMENT OF THE CASE

A. Procedural History

On November 19, 1987 respondent, William Howard Harrison, filed a petition for writ of habeas corpus under 28 U.S.C. §2254 challenging his incarceration pursuant to concurrent sentences of 10 to 20 years and 5 to 10 years imposed in the Philadelphia County Court of Common Pleas. The sentences were imposed following Harrison's conviction along with two co-defendants on September 20, 1982 for a robbery and conspiracy which occurred on February 5, 1982. Harrison's direct appeal from the judgement of conviction and sentence to the Pennsylvania Superior Court (No. 1572 Philadelphia 1983) resulted in an affirmance of the conviction on May 16, 1986. Thereafter Harrison filed a petition for allowance of appeal to the Supreme Court of Pennsylvania (No. E.D. Allocatur Docket 1986). The petition was denied on December 29, 1986.

In the petition for a writ of habeas corpus Harrison, a black man, raised a claim that the prosecutor practiced racial discrimination in his exercise of peremptory challenges so as to exclude from the jury six black venirepersons. Following an evidentiary hearing on October 5, 1988 United States Magistrate Tullio Gene Leomporra issued a report with a recommendation that Harrison's petition be granted. The report and recommendation was subsequently approved and adopted by the district court. In sum the magistrate found a prima facie case of racial discrimination arising from the prosecutor's use of six of eight peremptory

challenges available to him to strike six black venirepersons. The magistrate found that petitioners, hereinafter the "Commonwealth", rebutted the prima facie case of discrimination as to five of the six black venirepersons, but that it failed to rebut the prima facie case of discrimination in the peremptory challenge to venireperson, Alice Wright. On the basis of that finding the district court granted the petition for the writ conditioned upon the re-trial of Harrison.

The Commonwealth's appeal from the order granting the petition for a writ of habeas corpus was docketed in the Court of Appeals for the Third Circuit as Appeal Number 90-1175. Harrison cross-appealed from the court's ruling as to two of the other five venirepersons in regard to whom the court found the prima facie case discrimination had been rebutted. The cross-appeal was docketed as Appeal Number 90-1220.

On July 25, 1990 the Court of Appeals for the Third Circuit affirmed the district court's grant of the petition for writ of habeas corpus for racial discrimination in the exercise of a peremptory challenge to venireperson Alice Wright (Appeal Number 90-1175). The court dismissed as moot Harrison's cross-appeal (Number 90-1220). In its opinion the Court of Appeals commented in connection with its holding that Appeal Number 90-1220 was moot, that Harrison had not demonstrated that the district court's order was clearly erroneous. See Appendix at A-3-4 (text and n.1). The Commonwealth did not seek reconsideration by the Court of Appeals. The petition for writ of certiorari presently before the Court was

filed on October 15, 1990. Respondent received copies of the petition via the mail on October 16, 1990.

B. Statement Of Facts

1. Summary of Record of Jury Selection

The jury selection process in the state court which gave rise to the petition for writ of habeas corpus proceeded in the following manner:

The trial court gave general instructions to the entire venire panel and then asked the prospective jurors various standard general questions preliminary to being questioned individually. Thereafter the names of twelve venirepersons were chosen randomly. The first twelve venirepersons were questioned solely by the trial court, the remainder were questioned by the attorneys for Harrison, his two co-defendants and the prosecutor. (After the first twelve were questioned by the court the attorneys were given the opportunity to ask non-repetitive questions. None of the attorneys asked any questions at that time.) The attorneys used their peremptory challenges in an alternating manner. The exercise of peremptory challenges was done in a manner that prevented the venire persons from knowing which side struck a particular venireperson. After the court excused those venirepersons who were not accepted, a number of venirepersons was called equal to the number who were not accepted in the previous group, and instructed to sit in the seats for whom jurors had not get been selected. Jury selection

continued to proceed in this manner until twelve jurors were selected. The court then proceeded with the selection of two alternate jurors by the same method. In total 31 persons were considered for jury service. The names of the venire persons in the order called and a summary of the information obtained from them are listed below. For convenience the names of the six black venire persons struck by the prosecutor are marked with an asterisk and the venirepersons selected to serve are noted by the designation "selected". Also, the listing number corresponds to the seat number to which each venire person was assigned.

FIRST CALL:

1. Doris J. Ament Age 51, widowed, high school graduate, employed, lives alone.

2. Rachel E. Livezey (selected): Age 42, married, college graduate (Wesleyan College), majored in education, employed (school teacher).

3. Charlene Fitzgerald: Age 25, married, high school graduate, housewife (three small children).

4. Richard A. Edwards*: Age 46, married, 11th grade education in South Carolina, employed as a (truck driver), but unemployed at time of jury selection due to an injury. This juror stated that his wife was the victim of an assault four years earlier. He also stated that his son, a security guard, was convicted of unlawful possession of a firearm.

5. Sammy Toney*: Age 56, marital status not stated, 10th grade education in South Carolina, construction worker but presently

unemployed ("laid-off"), lives alone.

6. Rita C. Gower (selected): Age 62, marital status not stated, 8th grade education, employed (manages a restaurant), lives with sister.

7. Thomas Thakadipparumpil (selected): Age 51, married, college graduate in mathematics (in India), employed (machine operator in a factory)

8. Alice Wright*: Age 70, marital status not stated, 7th grade education in Georgia, lives alone. This juror stated that her son-in-law was a retired police officer.

9. Clare E. Lisowski: This venire person was excused after extensive questioning due to a physical disability.

10. Ellen Craig (selected): Age 64, marital status not stated, 10 years education, retired, lives alone.

11. Naomi R. Neal: Age 56, unemployed, and lives with an elderly sister. Neal stated that her home had been burglarized on one occasion and Neal had been robbed of her pocketbook. This venireperson was excused after extensive questioning due to an illness.

12. Arlene T. Kraemer: Age 35, marital status not stated, one year of college (accounting), employed (keypunch operator), lives with sister and mother.

SECOND CALL:

1. Monica Bishop (selected): Age 23, married, high school graduate, employed (Social Security Administration). This juror stated that her husband had been arrested for assault two or three

years earlier, that he was placed on probation and that he was still on probation at the time of jury selection.

3. William E. Lloyd (selected): Age 67, married, 10th grade education, "semi-retired". This juror stated that his son had been arrested for driving while intoxicated.

4. Margaret L. Matkowski (selected): Age 57, marital status not stated, high school graduate (in Austria), lives alone.

5. Stanley Loque*: Age 35, married, 2 years of college (studied "liberal arts"), employed (Social Security Administration). This juror stated that he works in the same building as panel member Monica Bishop, and knew her "in passing".

8. Carl Verna, Jr. (selected): Age 23, marital status not stated, high school graduate, employed (factory work), lives with his mother.

9. Randall E. Slimak (selected): Age 27, marital status not stated, student (medical school).

11. Edward E. Lindsay: Age 52, married, 10th grade education, employed (forklift operator).

12. Patricia A. Cantz (selected): Age 23, marital status not stated, high school graduate, lives with parents, employed (secretary). She stated that a brother had been arrested for possession of marijuana seven years earlier.

THIRD CALL[1]

5. Rudolph Gray, Sr.*: Age not stated, married, education not

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[1] Beginning with this group until the end of jury selection the venire panel members were questioned by the attorneys.

stated, employed (machinist). This juror stated that he was arrested for "interfering" with an arrest by a police officer five years earlier but that the charges were dismissed.

11. Paul D. Baker Age 26, married, high school equivalency diploma, employed (truck driver).

FOURTH CALL:

5. Michael Stumpo: Age 28, single, employed (tax collector).

11. Violet M. Hudson (selected) Age not stated, married, employed (secretary). This venire person stated that she had two sons-in-law who were police officers.

FIFTH CALL:

5. Alma Nottingham*: Age not stated, widowed, employed (salesperson in a department store) lives with daughters and a grandchild. During questioning by counsel for Harrison's co-defendant as to whether she would be fair to the defendants and the Commonwealth she stated she "probably" could be fair and hoped to be fair. The attorney described her as being hesitant.

SIXTH CALL

5. Edward F. Moniot: Age 59, married, employed (food service). This juror stated that his son-in-law was a police officer assigned to a "stake-out" squad.

SEVENTH CALL

5. Larry Strauss (selected): Age not stated, married, employed (IRS computer operator).

EIGHTH CALL (Alternates)

13. Ronald F. Noel, Sr.: Age 31, married, employed (machinist).

14. Thomas W. Ashley

Age not stated, married, owner of company which makes packaging-material.

NINTH CALL (Alternates)

13. Alice Ponsi (selected): Age not stated, married, employed (clerical worker).

14. Louis A. Kosinski (selected): Age not stated, married, retired jeweler.

2. Summary of Evidence Presented at Evidentiary Hearing

Two witnesses testified at the evidentiary hearing: the former Assistant District Attorney who selected the jury in question, Charles J. Cunningham, and appellee, William Howard Harrison.

Cunningham testified that he had been employed as an Assistant District Attorney from 1973 to 1986. He had tried over 100 hundred jury trials prior to prosecuting Harrison in September 1982, and subsequently tried 100 more before leaving the District Attorney's office. Cunningham testified that his approach to jury selection was as follows: He would think ahead to his closing argument and would try to select jurors "that I will be able to make that presentation to successfully". He added that he tried to select "people who will agree (with one another) ... because I didn't want a hung jury". He also wanted people who would respond well to him "as opposed to responding well toward defense counsel and poorly toward (him)".

Cunningham further testified that he believes every juror has a "reporting factor", that is, a person or persons to whom the

juror would be expected to tell about his or her jury service. Therefore, he stated, in evaluating a juror he also evaluated the people to whom the juror would have to "report". As an example, he testified that it would be difficult for a juror who was related to someone who had been convicted of a crime to report to that person that he had "just convicted someone ... of a serious crime, and they're probably going to go to prison, just like you did".

Cunningham also stated that he viewed a good employment history as an indicator that the person had a "stable lifestyle", and was able to "get along with other people (and) less likely to be an oddball ...". Moreover, their education indicated "the way they think"; whether they thought in "concrete terms", or were "inquisitive".

In regard to the jury selection in the instant case, Cunningham testified that he could not recall the physical appearance of the venire panel members and could not recall the answers given by the prospective jurors during voir dire. However, during jury selection he had taken four pages of notes; the notes were subsequently admitted into evidence as exhibit R-2. In the notes Cunningham had written information he considered important, such as age, education and other characteristics.

The prosecutor testified as follows in regard to his peremptory challenges to the six black venirepersons:

a. Richard A. Edwards

Cunningham noted that he had written "OK" in his notes indicating he intended to accept Edwards. However, he also had

drawn an arrow pointed downward which indicated a later decision to strike Edwards. Upon reviewing a statement in the transcript of the voir dire by Edwards that his son had been arrested for carrying a .357 magnum Cunningham suggested that information caused him to reject Edwards. He added on cross-examination that he believed that Edward's account of the arrest - that his son was a security guard who was merely cashing a check - was not entirely plausible; he thought Edwards may have been trying to minimize the circumstances of the case.

b. Sammy Toney

Cunningham testified that he could not recall why he struck Mr. Toney. He testified that it "could have been as simple as he and Mr. Edwards sitting next to each other in the jury box. They're both 56 years old, they're both from South Carolina. If the two of them were getting along well, I would not keep Sammy Toney after I had stricken Richard Edwards ... but I don't recall if that was the case".

c. Alice Wright

Cunningham noted that he had written "OK" on his notes next to Wright's name. He did not know why he struck Ms. Wright. He had not written her age in his notes, but assumed she was an older woman since her son-in-law was a retired police officer. "That could have been a factor; I don't know."

d. Stanley Logue

Cunningham noted that in his notes he had drawn an arrow pointing downward indicating he did not want Mr. Logue on the jury.

He also had noted that Logue said he had studied "liberal arts" at Temple University. Cunningham had no independent recollection as to why he struck Logue but suggested it was because Logue had studied liberal arts. Cunningham felt that persons who majored in liberal arts were inclined to be too "inquisitive" and to "look for doubt".

e. Rudolph Gray, Sr.

Cunningham could not recall why he struck Mr. Gray. He had made a note about Gray's reference to interfering in an arrest. He suggested that was probably the reason he struck Gray.

j. Alma Nottingham

Cunningham testified that his notes only indicated that Ms. Nottingham was a widow, that she was a sales person and that her daughter drove a cab. Upon reading the transcript of the voir dire Cunningham suggested that the reason he struck Nottingham ~~was~~ because she seemed to be "tentative" about her ability to be a good juror. At the conclusion of direct examination Cunningham specifically denied any discriminatory intent in jury selection in the instant case or in any other jury trial.

On cross examination Cunningham was asked to state his understanding of the law in regard to discrimination in jury selection in 1982. He stated that it was his understanding at the time of Harrison's trial that it was lawful to discriminate against black venirepersons in the use of peremptory challenges, and that the law forbade only "systematic exclusion" of black persons from venirepanels.

In addition Cunningham was questioned briefly as to his reasons for not striking certain venirepersons - Monica Bishop, Patricia Cantz and William E. Lloyd - all of whom had indicated that someone in their families had been arrested or convicted of a crime. In regard to Ms. Bishop, Cunningham testified that he inferred that her husbands's case (which involved an assault and for which he was placed on probation) was probably a "neighborhood type of thing". Similarly he did not regard the prior arrests for drug possession and drunk driving by persons in Cantz's and Lloyd's families as particularly significant because in his opinion they were not serious offenses.

Following Cunningham's testimony respondent Harrison testified that to his recollection all Commonwealth witnesses in the state court prosecution were white persons. Also, all but one of the jurors was white. The one non-white person was "a man from India" (presumably Mr. Thomas Thakadipparumpil).

IX. REASONS FOR DENYING THE WRIT

THE DISTRICT COURT ORDER GRANTING THE PETITION FOR WRIT OF HABEAS CORPUS WAS BASED UPON A FINDING THAT THE PROSECUTION UTTERLY FAILED TO REBUT THE PRIMA FACIE CASE OF RACIAL DISCRIMINATION AS TO VENIREPERSON, ALICE WRIGHT. IN ITS AFFIRMANCE OF THE DISTRICT COURT ORDER, THE COURT OF APPEALS MERELY EFFECTED A STRAIGHT FORWARD APPLICATION OF THE PRINCIPLES ENUNCIATED BY THIS COURT IN BATSON V. KENTUCKY, TO THE DISTRICT COURT'S FINDING. CONTRARY TO PETITIONER'S ASSERTIONS, THE GRANT OF HABEAS PETITION WAS NOT AFFIRMED DUE TO THE PROSECUTOR'S INABILITY TO RECALL WHY HE PEREMPTORILY CHALLENGED WRIGHT - IN FACT, HE COULD NOT RECALL WHY HE STRUCK AT LEAST TWO OTHER BLACK VENIREPERSONS - BUT BECAUSE HE COULD NOT ARTICULATE A RACE NEUTRAL REASON FROM THE RECORD, AND BECAUSE THE RECORD REVEALED THAT HE HAD USED HIS PEREMPTORY CHALLENGES EXCLUSIVELY AGAINST BLACK VENIREPERSONS, AND BECAUSE THE REASONS ADVANCED FOR AT LEAST TWO PEREMPTORY CHALLENGE WERE WEAK.

A. APPLICATION OF BATSON TO THE RECORD

Purposeful racial discrimination against black persons by prosecutors in the exercise of peremptory challenges violates a black defendant's right to equal protection, as well as the right of black citizens in general to equal protection in regard to acceptance for jury services. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 1717-18 (1986). It also calls in to question the fairness of judicial proceedings. Id. at 1718.

As stated succinctly by the Court of Appeal for the Eleventh Circuit in United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986):

> Batson rests on a rationale that blacks are

> entitled not to be struck for racial reasons, and black defendants are entitled to be tried in a system free of racially exclusionary practices. This represents more than a group entitlement not to be entirely excluded from participation. Rather, under Batson, the striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for striking of some black jurors are shown.

In Batson this Court noted that its opinion in Swain v. Alabama, 300 U.S. 200, 85 S.Ct. 824 (1965) had been interpreted in such a way as to place on defendants a "crippling burden of proof' of violation of equal protection principles. Therefore, the Court propounded a more effective procedure for discovery of racial discrimination in jury selection:

Initially, a defendant must establish a prima facie showing that a prosecutor deliberately discriminated on racial grounds in the exercise of peremptory challenges. To do so the defendant must first show that he is a member of a cognizable racial group. Secondly, he is entitled to rely on the fact that the process of exercising peremptory challenges allows those inclined to discriminate on racial grounds to do so. Finally, "the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude veniremen from the petit jury on account of their race." Supra at 1723. Once a prima facie case has been established, the burden shifts to the prosecutor to attempt to rebut the prima facie case of discrimination. To do so the prosecutor "must articulate a neutral explanation related to the particular case to be tried."

Id. Moreover, the Court held, the prosecutor's reason for exercising the peremptory challenge to strike black venire persons must be "legitimate" and the explanation of the legitimate reason must be "clear and reasonably specific". Supra at 1823, n.20.

It is readily conceded that it is likely that a prosecutor would forget his reasons for exercising peremptory challenges where as here he was not questioned about them until several years later due to the excessive delay in the state appellate court's disposal of Harrison's appeal. But in such cases the question is simply, who bears the burden of a prosecutor's lack of recollection - the government or the defendant? The answer has to be the former for several reasons.

First, Batson's directive is clear - unless the prima facie case is rebutted purposeful discrimination should be considered to have occurred. After all, by definition, the fact that a prima facie case of discrimination exists means that it appears on the face of matters that discrimination did occur. Second, a mere statement by a prosecutor that he does not remember why he exercised peremptory challenges - however plausible - cannot as a matter of policy be acceptable. The risk of abuse is too great. Obviously, a prosecutor who would purposely violate the law and engage in racial discrimination in jury selection is not likely to have much compunction about denying it or saying that he cannot remember. Third, it is not a harsh rule to require the prosecution rather than a defendant bear the burden of a prosecutor's lack of recollection for a peremptory challenge, no matter how plausible

the reasons for it. It is a necessary rule as a matter of policy given the overriding purpose of the Court's holding in Batson - to remedy as best possible the exercise of racial discrimination by government officials in an area of governmental authority where discrimination is especially intolerable, that is, in the administration of justice.[2] The prosecutor's inability to remember why a venireperson was struck need not leave the prosecutor empty handed and without a recourse in instances where a prima facie case of discrimination has been found. If there are other circumstances apparent in the record or presented at an evidentiary hearing which is sufficient to rebut the prima facie case that a prosecutor intended to discriminate in the exercise of peremptory challenges, then the claim of unlawful discrimination should fail. Other circumstances or other areas of inquiry or investigation which can shed light on a prosecutor's intentions are whether or not the peremptory challenge was isolated or appeared to be part of a pattern, or whether a purported reconstruction of events suggest reasons for peremptory challenges to black venirepersons which are not consistent with the prosecutor's treatment of other prospective jurors or simply reasons which are not entirely plausible.

Here the record is plainly sufficient to establish a prima facie case[3], the prosecutor could not recall the reason for

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[2] As noted by this Court in Batson discrimination in jury selection harms public confidence in the judicial system and is a stimulant to discrimination in general. Supra at 1718.

[3] See magistrates's report, App. at C-20-24.

striking the prospective juror, Alice Wright, and most importantly there is nothing in the record of the voir dire to rebut the prima facie case of discrimination. At the evidentiary hearing the prosecutor suggested that her age may have been a factor, but he had not even noted her age in his handwritten notes despite his stated practice of noting important characteristics. Moreover, the record establishes that the prosecutor did not strike several jurors who were close in age to Wright. See supra at 11-12 (Venire persons Rita C. Gower, age 62; Ellen Craig, age 64; and William E. Lloyd, age 67). Of course, older persons can vary a great deal in their appearance and level of energy, but there is no basis to speculate that Wright seemed significantly older than the other jurors. Nor is there reason to believe that her age would have been a basis for striking her even if she seemed "older" and less energetic than the other jurors. There was nothing about the case that gives rise to an inference that older jurors would not be desirable from the Commonwealth's point of view.[4] In addition, Wright stated that her son-in-law was a retired police officer. By the prosecutor's theory of jury selection - that it was necessary to consider to whom a prospective juror would have to "report" his or her verdict - Wright was an ideal juror.

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[4] Compare United States v. Clemons, 843 F.2d 741, 748, (3d. Cir. 1988) - use of peremptory challenges to strike young persons in narcotics prosecution held to be "logical".

B. THE SIGNIFICANCE OF THE "OK" NOTATION

One slender bit of evidence which the Commonwealth claims tends to rebut the prima facie case of discrimination - the fact that the prosecutor wrote "OK" next to Wright's name indicating an initial intention to accept her - upon analysis actually seems to indicate a predisposition to discriminate against black venirepersons.[5]

It hardly seems likely that the prosecutor intended "OK" to signify his intention to accept prospective jurors, but just forgot to make that notation for nearly all jurors in this particular case. Rather, it may be inferred from the prosecutor's use of the "OK" notation in regard to two black venirepersons that "OK" indicated a predisposition on the part of the prosecutor not to accept black jurors, absent something he considered to be a positive characteristic to overcome his predisposition. As the record shows, Alice Wright and Richard A. Edwards did have characteristics which made them desirable jurors from the prosecution's point of view. (See supra at 17-18, 27) Thus, it appears that as to all six black venirepersons peremptorily challenged by the prosecutor, only Edwards and Wright were seriously considered

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[5] The record establishes that Cunningham used the notation "OK" three times. The record also discloses that the notation was applied to two black venirepersons in the first group of twelve panel members - Richard A. Edwards, and Alice Wright. However, the record does not reveal the race of the third person to whom the notation was applied, Naomi Neal. (The significance of the lack of record as to Ms Neal's race is discussed below.)

for acceptance by the prosecutor.[6]

It is unfortunate that the record does not indicate Neal's race since it would shed light on the prosecutor's intention in writing "OK" only next to certain venire persons.[7] Venireperson Naomi Neal like Edwards and Wright had characteristics which made her desirable from the prosecution's point of view. She had twice been the victim of crimes - one burglary and one robbery. Since

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[6] At the conclusion of his testimony on direct examination the prosecutor suggested that the fact that he took notes as to the information provided by black jurors supported his contention that he had no intention to discriminate, because if he did have such an intention "I wouldn't have taken these notes..." The Commonwealth made a similar argument to the Court of Appeals.

However, the foregoing argument has no merit because it presupposes that a discriminatory intention must necessarily be all or nothing. Clearly a prosecutor who is strongly inclined to discriminate in jury selection against black persons will not necessarily strike every black person. Any given white venire person may have characteristics which are so undesirable from the prosecutor's point of view as to lead him to accept a black venire person despite his discriminatory predisposition rather than the particular white venireperson. (In fact, discrimination in employment practices usually entail precisely that kind of discrimination, not outright "no blacks wanted" discrimination.)

[7] The fact that the record does not disclose the race of Ms. Neal may be attributable to an ill-founded objection by the prosecutor during jury selection. After defense counsel objected to the prosecutor's use of peremptory challenges to black venire persons the trial court stated in response that "under the present status of the law that is not a basis... for sustaining your position". However, the court suggested to defense counsel that "(p)erhaps you'd better indicate who those people were. Let's go down the list. Juror Number Six ..." At that point the prosecutor interjected "... If (defense counsel) had not stated a cause for which relief can be granted, why are we doing this?" The court simply answered, "All right" and resumed jury selection. Therefore the race of the venire persons called beginning with the very first one, Number 006, Doris Ament were not disclosed at that time. Of course it is not certain that Ms. Neal's race would have been stated for the record but it may have been.

she lived with and cared for an elder sister the latter presumably was as much a victim of the burglary as was Ms. Neal herself. Therefore the person to whom Neal - in the prosecutor's parlance - she would be expected to "report" was, like Neal, a crime victim. Yet as has been noted Neal was excused due to her high blood pressure without objection by the prosecution or defense. If Ms. Neal was white that fact would weaken the inference that the "OK" notation reflected a predisposition to discriminate against black venirepersons. On the other hand, if Ms. Neal was black, application of the notation exclusively to three black venirepersons would necessitate the inference that it was indicative of a predisposition to discriminate. As it is now all we know of Ms. Neal's personal characteristics is that she was fifty-six years old, that she had moved to Philadelphia from Florence, South Carolina some time after attending high school there, and that she suffered from high blood pressure.[8]

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[8] The Commonwealth has attached great significance to the magistrate's comment regarding the prosecutor's use of "Ok". Also, in its brief to the Court of Appeals the Commonwealth suggested that Harrison failed to question the prosecutor's use of the "OK" notation in a timely manner to permit the prosecutor to respond to Harrison's argument that it reflected a predisposition to discriminate. First, the only statements made by Cunningham regarding his use of the "OK" notation were to the effect that it indicated that he had decided to accept Edwards and Wright. He did not mention Naomi Neal and he did not explain why he used that notation for Edwards and Wright. Therefore the only testimony by the prosecutor regarding the "OK" that the magistrate could credit was the aforementioned testimony - period. The statement in the magistrate's report that the "OK" dissipated the inference of discrimination is itself simply an inference - an interpretation of the meaning of a piece of evidence which the Court of Appeals was free to accept or reject (as it gives rise to a mixed question of law and fact).

C. The Prosecutor's Weak Reasons For Striking Two Other Black Venirepersons

Harrison argued to the Court of Appeals that the district court's finding that the prima facie case of discrimination as to venirepersons Sammy Toney and Stanley Logue was clearly erroneous. As noted supra the Court of Appeals held that Harrison's cross-appeal raising this claim was mooted by its disposition of the Commonwealth's appeal. However, the Court did note that the

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The Commonwealth's complaint that Harrison's argument was advanced untimely implies that its present interpretation of the significance of the "OK" notation did not originate with the magistrate but has been a staple all along of its attempt to rebut the prima facie case of discrimination. But as noted above the only reference to the "OK" notation at the evidentiary hearing was the prosecutor's statement that he used it to indicate his initial decision to accept Edwards and Wright. No explanation for his use of the notation for those persons, but not for others was elicited by the Commonwealth.

It is correct that Harrison made no reference to the "OK" notation in his brief to the magistrate after the evidentiary hearing. But his brief was the first due and no special significance had as yet been attributed to the notation. In fact no specific reference was made by the Commonwealth to the "OK" notation in its brief to the magistrate or in its memorandum in support of its statement of objections to the magistrate's report. Rather, the Commonwealth simply noted that the prosecutor testified that based upon his review of the handwritten notes he had initially decided to accept Edwards and Wright but in each instance was led to change his mind.

Therefore, since the first specific reference to the "OK" notation by the Commonwealth was in its initial brief to the Court of Appeals it is hardly unreasonable that Harrison's refutation of the Commonwealth's argument should also have first "surfaced" in its brief to this Court. (Moreover Harrison had no reason at the district court level even to respond to the magistrate's reference to the "OK" notation because the magistrate recommended granting the habeas petition due to discrimination as to Alice Wright, and Harrison was not objecting to the finding that the prima facie case of discrimination had been rebutted as to Edwards.) This claim is demonstrably baseless and misleading.

prosecutor's reasons for striking some other venire persons was "weak". Undoubtedly the Court had in mind the prosecutor's explanation for striking Toney and Logue at the very least.

The Record Regarding venireman Sammy Toney: As was the case with Alice Wright the prosecutor could not recall or reconstruct from his note why he used a peremptory challenge against Toney. However, over objection he was permitted to tender a purely conjectured explanation, to wit: that "it could have been as simple as (the fact that) he and Richard Edwards, (whom Cunningham had stricken) were sitting next to each other in the jury box (in seats four and five respectively). They were both 56 ... (and) from South Carolina.[9] If the two of them were getting along well, I could not keep Sammy Toney after I had stricken Richard Edwards ... but I don't recall if that was the case."

In other words, as was the case with Alice Wright, Cunningham did not give an explanation for the peremptory challenge to Toney. He did not recall why he struck him, and he could not reconstruct one from comments in his notes. Therefore, the magistrate's finding that Cunningham's peremptory challenge of Toney "was based solely on his intuition that Toney, who was sitting next to the stricken juror Edwards, was becoming friendly with Edwards because they were the same age and both from North Carolina (and because) Cunningham reasoned that Toney could hold a grudge against the

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[9] Cunningham's notes were mistaken in this record. The record of the voir dire shows that Edwards said he was 46 years old.

prosecutor for having stricken his friend, Edwards", was not supported by the record.[10]

Moreover, Cunningham's speculation as to what "may have been" the reason for the strike fails the test of rationality. First, no significance whatever can be attributed to the fact that Edwards and Toney sat together in the jury box. There was no evidence Edwards and Toney (who lived in different parts of the city) even knew each other, or knew of each other's backgrounds. They happened to sit together because their names or numbers happened by chance to be called in that order and they sat where they were directed to sit according to the order in which they were called. Moreover, there is no evidence whatever that they even talked with one another while in the jury box and presumably in the presence of the judge and the attorneys.[11] Nor was there any evidence that Toney knew or even could have known that Edwards was challenged by the prosecutor.[12]

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[10] In the report the Magistrate also stated "(i)t has been very difficult to determine whether or not the striking of Toney was racially motivated". But the magistrate concluded, "(w)hile I am not overwhelmed with the prosecutor's logic, there was little contradictory evidence to question the difficult standard that Batson requires". (App. at C-63).

[11] Compare United States v. Garrison, 849 F.2d 103 (4th Cir. 1988) (Peremptory challenge to two black women upheld because they chatted during voir dire, and seemed disdainful of the voir dire process.)

[12] In its petition (at 10, n.3) the Commonwealth asserted that "like venireperson's Edwards and Toney, whom the prosecutor also struck, Wright fit a profile of being from the South, not having completed her high school education and being unemployed at the time of trial." This comment is baseless. Cunningham never

In short, the record shows that the prosecutor had no recollection of the reason for striking Toney and his speculated reason in this instance was no more meaningful than his speculation that Alice Wright was struck due to her age.

The Record Regarding Stanley Logue: Cunningham did not recall why he struck Logue but thought it was likely that he did so because the 35 year old Logue had majored in "liberal arts" during his two years in college and Cunningham had highlighted "liberal arts" in his handwritten notes. Cunningham stated that in his opinion liberal arts students were inclined to be inquisitive and to look for doubt. Perhaps that explanation is plausible in an abstract sense. But the explanation must be evaluated to determine whether it is legitimate, or genuine and reasonably related to the case to be tried. In fact the questionable legitimacy of Cunningham's explanation becomes readily apparent upon comparing Cunningham's treatment of other prospective jurors. For one thing, Cunningham never inquired into the level of education or course of study of any other jurors who were not asked that information by the trial judge or defense attorneys. Thus there is no indication of any interest in the level of education or course of study of prospective jurors Gray, Stumpo, Hudson, Nottingham, Moniot, Strauss, Noel, Ashley, Ponsi and Kosinski.

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testified to a disinclination to accept as jurors persons who fit the above stated "profile". On the other hand, perhaps there was an operative profile the one additional aspect of which - not mentioned by the Commonwealth in note 3 - was that all three venirepersons were black.

In addition, Cunningham's claimed concern with inquisitive, doubting jurors is called in to question by his acceptance of a college graduate who majored in education and was employed as a teacher.[13] Logue on the other hand was 35 years old, and could have completed his two years of college study as many as fifteen years before jury selection. Moreover, although Cunningham claimed to want persons who would be able to agree with one another, he failed to accept Logue although he and another juror (Monica Bishop) worked in the same building and for the same government agency. In addition, Logue by all appearances was the kind of stable person Cunningham said he looked for in selecting jurors. In short, as was the case with Sammy Toney the record suggests Cunningham's explanation for his peremptory challenge to Stanley Logue was not genuine, but rather was an after-the-fact explanation.

D. The Magistrate's Supposed Fact-Finding That The Prosecutor Had No Discriminatory Intent.

The Commonwealth argues in its petition that magistrate (and district court) made an express fact finding that the prosecutor's "peremptory strike of venireperson Wright was not motivated by racial bias and that he did not discriminate in jury selection."

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[13] It is conceded that Cunningham's acceptance of juror Ronald Slimak who was a third year medical student does not serve as a basis for comparison since the juror provided a strong incentive to the prosecutor to accept him, namely his friendship with an Assistant District Attorney and a police officer.

Specifically, it points to the magistrate's statement: "We also have no reason to conclude that (the prosecutor) exercised purposeful discrimination or that his motives and creditability [sic] are suspect." (Petition at 11-12. See also Petition at 20-21, n.9.) However, a detailed review of the Magistrate's Report and Recommendation undercuts the Commonwealth's claim.[14]

The magistrate's report begins with a preliminary review of the evidence presented at Harrison's trial, and a review of law establishing the applicability of Batson to the instant case. (App. at C-1-20). Next the report states the basis for a finding of prima facie case of discrimination. (App. at C-20-24). The magistrate's report then sets forth the "facts established during the evidentiary hearing". App. at C-26. Nowhere in that section of the report is there a finding that the prosecutor did not have the intention of practicing racial discrimination in jury selection. See generally App. at C-25-35. At the beginning of the final (and longest) section of the report which is entitled "Discussion of Law" the Supreme Court's holding in Batson is

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[14] In its petition (at 12-13) the Commonwealth noted that the district court approved and adopted the magistrate's report and recommendation. It then stated: "Specifically, the District Court adopted both the magistrate's finding that racial bias was not a reason for the prosecutor's strike of venireperson Wright, as well as the conclusion that Batson nonetheless compelled relief because the prosecutor 'failed to articulate a neutral reason for challenging one of the six jurors' Appendix B, B-3."

In fact, the first half of the latter (quoted) statement is not correct. The district court did not "specifically" adopted the magistrate's "finding that racial bias was not a reason" for the peremptory challenge.

reviewed again as are several federal cases which discuss Batson. Toward the end of this beginning part of the section entitled "Discussion of Law" it is stated "(o)ther than a review of these cases, and the words of Batson itself, we are given no other guidelines to determine whether D.A. Cunningham's proffered reasons rise to the level required by Batson. We also have no reason to conclude that (the prosecutor) exercised purposeful discrimination or that his motives and credibility are suspect." App. at C-38-40.

The report then reviews the reasons given by the prosecutor for the six peremptory challenges in question. App. at C 40-46. After a detailed review of the reasons proffered by the prosecutor as to each venire person the report notes that the court's analysis "must go deeper than simply examining the reasons Cunningham proffered for striking the six black venire persons" such as consideration of the prosecutor's "questions and statements during voir dire", the "prosecutor's use of the voir dire process to determine whether his concerns with the venire persons were real", and whether the characteristics which prompted the peremptory strikes are similar to those characteristics of the empaneled jurors". (Citations omitted.) App. at C-46. From that point on to its conclusion, the report consists of an analysis of the aforementioned considerations in connection with the reason for the strikes suggested by Cunningham. In this section the venirepersons are not reviewed in the order in which they were called and in which they were previously discussed, but instead in the following order: Edwards, Gray, Logue, Nottingham, Toney and Wright. The latter two

are distinguished from the first four, according to the report, on the basis that the prosecutor "could not remember clearly why he (struck) Toney or Wright ... (but) had been able to recall why he struck the other four jurors." (App. at C-66).

In regard to Alice Wright and Cunningham's suggestion that he may have stricken Wright because of her agent the magistrate observed:

> The reason I must reject this explanation is not because of age but because the prosecutor could not recall his reason. The testimony which I credit is summarized by his repeated statement "I don't know." Since this is not a satisfactory statement under Batson, I conclude the evidence is not acceptable and the Commonwealth has failed to meet the standard.
>
> I do not believe that D.A. Cunningham utilized his peremptory challenges in a discriminatory manner, but only that he failed to satisfy the Batson test. ... (App. at C-67-68).

The foregoing has been construed by the Commonwealth as a statement that because the prosecutor could not recall why he struck Wright (as opposed to reconstruct why he struck her), he must be regarded as having failed to rebut the prima facie case of discrimination. But that is not precisely what the magistrate said. Also, such a reading of the magistrate's comment attributes totally contradictory findings to the magistrate since he had already observed that the prosecutor could not recall his reasons for striking Toney as well as Wright.

The reason the magistrate found that the prosecutor failed to rebut the prima facie case was literally because the prosecutor had said "I don't know". That is he could not recall why he struck her

and could not reconstruct a satisfactory explanation from his notes or from the record of voir dire.

In light of this, and in light of the structure of the magistrate's report the statement in the beginning of the "Discussion of Law" section of the magistrate's report that "(w)e ... have no reason to conclude that D.A. Cunningham exercised purposeful discrimination or that his motives and creditability are suspect" (App. at C-40) must be viewed as a statement of a presumption rather than a finding of fact. After all, it was precisely because there was a prima facie case of discrimination that a hearing was required. In that sense the prosecutor's motives were very much suspect. Also, the statement is out of place as a fact finding because it appears in a context in which the magistrate was purporting to undertake an analysis of the reasons for the peremptory challenges, not stating his findings or conclusions.[15]

As noted above, at the conclusion of the report in the context of observing that the prosecutor said he did not know why he struck venire person Wright, the magistrate stated "I do not believe that D.A. Cunningham utilized his peremptory challenges in a discriminatory manner, but only that he failed to satisfy the Batson test". (App. at C-67). In comparison to the foregoing statement this statement certainly reads as a straight-forward factual finding.

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[15] If in fact the foregoing was a statement of a presumption that the prosecutor would not have been inclined to discriminate it was improper. See United States v. Wilson, 853 F.2d 606, 609 (8th Cir. 1988). (Presumption that prosecutor would not have exercised peremptory challenges unlawfully was improper. "Under Batson, the Government is entitled to no such presumption.")

Yet in context it also seems to be something less - a mere observation, or a in effect a statement that the presumption accorded to Cunningham earlier - that his motives were not suspect - was still in force.

In any case this Court observed in Batson that mere assertion of good faith, non-discriminatory intention on the part of or behalf of a prosecutor are not sufficient to rebut a prima facie case of discrimination. Supra, 106 S.Ct. 1721, 1723:

> "If (denials of discriminatory motives and assertions of good faith) were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement' (Citation omitted) The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. (Foot note omitted). The trial court then will have the duty to determine if the defendant has established purposeful discrimination. Supra at 1723-1724.[16]

Consequently, even if the magistrate's comment to the effect that the prosecutor's motives were non-discriminatory, such a "finding" is immaterial because it is insufficient to overcome the prima facie case of discrimination.

E. The Supposed Conflict Between the Circuits

In its petition the Commonwealth asserts that the Third Circuit's decision in the instant case is in conflict with "rulings of the United States Courts of Appeals for the Eighth and Fourth Circuit". (Petition at 20). Specially, petitioner's assert that

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16 In a footnote (21) the Court observed: "'a finding of intentional discrimination is a finding of fact' entitled to appropriate deference by a reviewing court." (Citation omitted.)

the latter Circuits "have expressly recognized that in pre-Batson case such as this, the prosecutor's inability to remember his precise non-racial reason for striking each potential juror does not logically give rise to an inference of discrimination and is not fatal to his ability to satisfy the prosecution's burden under Batson." (Petition at 23-24). And in a footnote (10) petitioner's accuse the Court of Appeals for the Third Circuit of having "failed to even address, much less distinguish the reasoning" in the Eight and Fourth Circuit case.

However, a review of the cases cited by the Commonwealth reveals them to be so readily distinguishable as to not have necessitated discussion by the Third Circuit in its opinion in the instant case however desirable such discussion might have been.

In United States v. Nicholson, 885 F.2d 481 (8th Cir. 1989), the prosecutor used three of six peremptory challenges to strike black venire members. Since Batson was decided while the case was on direct appeal the Court of Appeal remanded the case to the district for an evidentiary hearing. The district court found that a prima facie case of discrimination had been established, but also found - contrary to the present case - that "the government had articulated a neutral explanation for its peremptory challenges..." Supra at 482. Although the prosecutor could not locate his notes made at the time of jury selection and could not recall the specific reasons he peremptorily challenged the three black venire persons, he could - and did - reconstruct the reasons from the record. Specifically, the prosecutor testified to his general

criteria for jury selection - a preference for older, married, employed persons, and a disliking for those who have little to say during voir dire - and compared these criteria with the voir dire record and found that each black venireperson had at least one disqualifying characteristics.

In its opinion the Eighth Circuit cited with approval its prior decision in United States v. Wilson, 867 F.2d 486 (1989) which decision was also cited in the Commonwealth's petition. As in Nicholson, the prosecutor in Wilson could not recall his specific reason for striking black venireperson (in this case two woman) but noted that the strikes were consistent with his stated preference for male jurors in prosecutions for a "street crime". United States v. Wilson supra quoted in United States v. Nicholson, supra at 483. In Wilson the Court held that the prosecutor's explanation was "sufficiently specific under Batson inasmuch as it provided the District a basis upon which to conclude that the Government had not stricken there venireperson the assumption that they would not be partial to the defendant because of their shared race." Id. In Nicholson the Court applied the same reasoning to the prosecutor's testimony and accordingly found that the district court's decision was not "clearly erroneous".

Here the Court of Appeal suggested that if the question of racial discrimination against venireperson Toney and Logue were not moot it would have found that the district court's ruling in connection with them was not clearly erroneous - despite the prosecutor's inability to recall why he struck them. (See Appendix

A-4, n.1). In short, as was the case with the prosecutors in Nicholson and Wilson, the prosecutor in the present case was found to have successfully reconstructed a race neutral reason for the peremptory challenges to Toney and Logue (as well as to three other venirepersons). However here, paraphrasing the Eight Circuit's decision in Wilson, the prosecutor was not able to provide the district court a basis upon which to conclude that he had not stricken venireperson Wright on account of her shared race with Harrison. In other words, only if the Court of Appeals for the Third Circuit had held that the prosecutor's mere inability to recall the reasons for his peremptory challenges was grounds for finding discriminatory intent would the decision in the present case be inconsistent with Nicholson and Wilson. The Court did not so hold; thus there is no conflict.

The Commonwealth's attempt to demonstrate conflict with the Fourth Circuit as a result that court's decision in United States v. Harrell a/k/a Allen, 847 F.2d 138 (1988) is equally unsuccessful. In Harrell, the Court of Appeals was reviewing a district court ruling following an evidentiary hearing on the issue of discrimination in jury selection. (This Court had remanded the case to the Court of Appeals in light of Batson and the latter Court had ordered the evidentiary hearing.) In its per curiam opinion the Court of Appeals noted that the prosecution had stricken five black venire persons, and that the district court had found a prima facie case of discrimination but also that the court found the prosecutor had rebutted the prima facie case. The Court

then observed that the prosecutor testified to his criteria in jury selection - a preference for "educated" and employed venirepersons - and that "a review of the record shows that he was successful in his efforts". Lastly the Court referred with approval to the opinion of the district court, United States v. Allen, 666 F.Supp. 847 (E.D. Va. 1987). In the latter opinion it was noted that the prosecutor "admitted that he could neither recollect nor reconstruct the actual physical appearances of the jurors". Id. However, the prosecutor was able to explain the reasons for his peremptory strikes by reference to the criteria noted above. Moreover, the jurors who were selected did in fact affirmatively fit the prosecutor's stated preferences. (That is, each juror had a high school education or was employed on both.) In addition, the prosecutor was able to recall that he peremptorily struck two black woman for reasons having to do with their demeanor. He could recall his specific objection to one of the latter (that she was inattentive) but he could not recall his particular objection to the second - only that it had to do with her demeanor.[17]

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[17] The district court's opinion states with regard to the prosecutor's explanation of his challenge to the second black venirewoman: "... Mr. Krazenski testified that his handwritten "no" besides Barbara Smith's name meant, 'there was something I observed about her, some very specific observation which I cannot recall at this time. '... In reliance or Swain .... (footnote omitted) the prosecutor had no reason in May 1985 to think that he had to record or document the selection process." The "no" written by the prosecutor in Harrell seems (comparable to the downward pointing arrow used by the prosecutor in the present case in connection with venirepersons Edwards and Logue - that is, as a notation or symbol indicating definite disapproval for some reason, stated or unstated. But it certainly does not have the same import as the use of the notation "OK" by the prosecutor in connection with two

Lastly in Harrel the district court gave consideration to the "totality of circumstances" surrounding the prosecutor's use of peremptory challenges to five black venirepersons. Of curse, the Court of Appeals undertook precisely the same kind of analysis in the its opinion in the present case. The most significant circumstance was that the prosecutor did not challenge three black persons who were seated as jurors, and another who was seated as an alternate. In comparison, here the prosecutor used only six of eight peremptory challenges and used all six against black venire person, and no black person served on the jury.[18]

Two other decisions cited by the Commonwealth for the proposition that "failure to explain every peremptory strike is not necessarily fatal to prosecutor's ability to meet burden under Batson', hardly require discussion. The decisions in question are United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986) and United States v. Forbes, 816 F.2d 1006, 1011, n.7 (5th Cir. 1983). In Forbes the prosecutor peremptorily challenged three black venirepersons (one of who was a potential alternate). The prosecutor interpreted the defense objection as a demand that he explain only two of the three strickes, and therefore he did so. The

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black venireperson, and a third venireperson whose race is not a matter of record.

[18] Moreover, the Court of Appeals found that reasons for peremptory challenges to several venireperson in addition to Alice Wright was "weak". In a similar view, in regard to the peremptory challenge to Sammy Toney the magistrate stated: "While I am not overwhelmed with the prosecutor's logic then was little contradictory evidence..." (App. at C-63).

defense raised the issue of the lack of explanation as to the strike of the third venireperson for the first time on appeal. The Court of Appeals held the objection was untimely. In a footnote (7) the Court referred with approval to a statement in United States v. David, supra at 1571 which the Commonwealth quoted only in part - that "'(f)ailure... to explain every peremptory strike of black jurors is not necessarily fatal to the prosecutor's ability to rebut a prima facie case; likewise, explanation of most of the strikes on non-racial grounds does not necessarily "satisfy his burden". Quoted in United States v. Forbes, supra at 1011, no.7. (Emphasis added.) The foregoing admonition by the Court of Appeals for the 11th Circuit is precisely the kind of balanced approached which the Court of Appeals for the Third Circuit undertook in the present case.

X. CONCLUSION

For all of the foregoing reasons it is reasonable to characterize petitioner's attack on the Court of Appeals opinion as without merit. While not insignificant in its import, the Court's opinion is perfectly consistent with this Court's Decision in Batson v. Kentucky and is not in the least in conflict with decisions reached in other Circuits. Accordingly the petition for writ of certiorari should be denied.

Respectfully submitted

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Assistant Defender

CERTIFICATE OF SERVICE

I, Michael J. Kelly, Assistant Defender, hereby certify that I have served three copies of the attached Respondent's Brief In Opposition To Petition For Writ Of Certiorari To The United States Court of Appeals For The Third Circuit upon Gaele McLaughlin Barthold, Deputy District Attorney, Elizabeth Chambers, Chief Federal Litigation Unit and Kathy L. Echternach, Esquire, Assistant District Attorney, by mailing a copy to her office, 1421 Arch Street, Philadelphia, PA 19102, via first class mail, postage prepaid.

Michael Kelly

MICHAEL J. KELLY

DATE: 11-14-90